CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA

AT

OPELOUSAS.

JULY, 1881.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice;*

HON. F. P. POCHÉ,
HON. R. B. TODD,
HON. WM. M. LEVY,
HON. C. E. FENNER,
} *Associate Justices.*

No. 1116.

SUCCESSION OF MÉLASIE HÉBERT.

A natural child, pretending to have been legally acknowledged by her deceased parent, can oppose the application of collateral heirs for the administration of the succession of said deceased parent, without having first been judicially decreed to be an acknowledged natural child, as claimed. The proof of parentage and acknowledgment may be made on trial of the Opposition to the application for administration.

The restriction contained in Article 221 of the Code of 1825, viz: "No other proof of acknowledgment shall be permitted in favor of children of color," having been repealed by elimination from the Code of 1870, children of color have now, whatever be their descent, the right to prove their acknowledgment in the same manner as white children.

Acts of baptism are public acts, which require no proof of their genuineness; and certified copies of them, made by their proper custodians, are admissible in evidence as well as the originals.

A child whose parents, at the time of conception, could not contract marriage because one of them was a colored person, could legally be acknowledged after the prohibitory law was abolished.

The mother, in this case, was deaf and dumb, and was, several years after the acknowledgment, interdicted for insanity. These reasons were also urged to show the illegality of the acknowledgment, but were overruled by the Court.

No administrator should be appointed to a succession which is not burdened with debts and requires no liquidation.

APPEAL from the Twenty-Fifth Judicial District Court, parish of Lafayette. *Moulton*, J.

M. E. Girard for the Opponent and Appellant:

The capacity and status of an heir is to be determined by the laws in existence at the date of opening of the succession.

The status of a child depends upon that of the mother, the child of a free woman is free, and the child of a white woman is white.

Illegitimate children may prove their maternal descent and the acknowledgment of their mother by any legal evidence, for all purposes. 26 An. 99; 4 An. 305-6; C. C. 212; 6 La. 570.

The paternal descent of a child cannot be proven to affect his right of inheritance from his mother.

Insanity is not presumed and must be clearly proven to exist at the date of the act attacked on the ground of insanity.

No law requires a manual presentation of a child at its baptism by the mother.

The certificate of baptism in the usual form is entitled to full faith for all it contains germain to the act.

C. Debaillon for Defendants and Appellees:

First—Heirship of collaterals admitted and proved.

Second—Strict proof of descent and identity of child required. 11 An. 59; 6 An. 161. Burden on opponent. Same authorities.

Third—Opponent is a bastard, R. C. C. 202; 18 An. 590, and could not be acknowledged, R. C. C. 203-204; and cannot inherit. R. C. C. 920-918; 18 An. 590; 6 An. 161; 15 An. 342. The law reprobates the begetting of illegitimate children. 18 An. 592, &c.

Fourth—A person deaf, dumb and insane, cannot make a legal acknowledgment of a child. R. C. C. 1782-1788.

Fifth—Baptismal registry not sufficient, when one of the parents is white and the child colored. Old C. C. 221; 21 An. 437, &c.

Sixth—The simple Baptismal Act, without the declarations of the parents or of a duly authorized agent carries with it no civil effect. Marcadé vol. 2 p. 50, 75; R. C. C. 205-2987.

Seventh—The Baptismal Act is an act under private signature, due execution of it, as well as signature must be proved before it is admitted in evidence. 22 An. p. 458; Brief, p. 6.

Eighth—Priests are not officers, 10 An. 673. Proof that De Chaignoz was a priest was necessary.

Ninth—Acknowledgment of a natural colored child from a white parent cannot be established by presumption of facts. Old Code 221. Legal acknowledgment absolutely necessary. R. C. C. 918; 33 An. p. 282.

Tenth—Proof of maternity alone not sufficient.

Eleventh—Decision in 4 An. 305, not considered correct. See Brief, p. 11-13, and not applicable to the case at bar.

Twelfth—There was an absolute necessity in this State to discourage the amalgamation of the white and colored race, which did not exist in France. 6 An. 161; Old Code 95.

Thirteenth—Every claim, set up by natural children may be contested by those who have any interest therein. R. C. C. 207; 11 An. 59; Marcadé vol. 2 p. 71.

Fourteenth—The mention in the note of evidence, that evidence was objected to, without stating grounds, is not equivalent to the reservation of Bill of Exception. 32 An. 260; Acts 1877, E. S. p. 176, requires objections to be taken down, and also ruling of the judge thereon otherwise bill must be tendered.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The succession of Mélasie Hébert was opened by her collateral relatives, two of whom prayed to be appointed to administer it. Their application was opposed by Emelia Hébert, repre-

senting herself as the acknowledged natural daughter and sole issue of the deceased, and averring that, in the absense of debts and charges, an administration was unnecessary and would prove onerous. She prayed that the petition be dismissed and that she be recognized as the sole heir of the deceased and put in possession of her estate.

An appearance was entered by the collaterals, in bar to the recognition sought by the opponent, charging her with being a bastard, entitled to no standing in court, previous to judicial recognition, which cannot be obtained in the form attempted.

On those issues, the parties went to trial. After hearing, the court rendered judgment rejecting the opposition, and the opponent has appealed.

The case appears to have been as warmly contested in the lower court as it was here; but the grounds for respective resistance are more easily ascertained from the course of the proceedings than from the pleadings.

We meet no difficulty in finding sufficient, nay, ample, superabundant evidence showing maternity and identity. Apart from the judicial admission of the collaterals in their answer to the opposition, the evidence shows that Mélasie was the mother and that Emelia is the daughter. No better proof could have been adduced of these two facts than the uncontradicted and unassailed testimony of the sister of Mélasie, who officiated on the occasion as midwife, who has known and followed the child from her birth to the day when testifying, she identified Emelia as such child in open court.

The contention is, that the opponent is a *colored* person, the illegitimate and unlawful fruit of the connection of the deceased, who was a *white* woman, with a man of *African* blood; that the opponent never was acknowledged by her mother, either in a notarial act, or in the registry of her birth or baptism; that, even had she been, the acknowledgment would be absolutely void, because made by a person insane, and violative of a prohibitory law, which forbids such acknowledgment in favor of children whose parents were incapable of contracting marriage at the time of conception, which was the case then between white and colored persons.

On the other hand, the opponent and appellant contends that she was legally acknowledged; that her mother was not insane; that, she is not a person of color; that, if any incapacity existed, as charged, to her valid acknowledgment, it lasted only until it was obliterated by subsequent constitutional and legal provisions, and that the incapacity of an heir is to be determined at the moment of the opening of the succession.

We propose *first* to consider the objection to the form in which the

opponent has couched her demand for recognition, and *next* to deal with the case in other respects.

It is a familiar principle that, unlike legitimate heirs, natural heirs are not seized of the succession accruing to them, at the death of the *De Cujus*, and that the law requires them to be first recognized before they can be put in possession of the *hereditas jacens;* but this requirement is not to be extended so as to prevent a natural child, by one and the same proceeding, claiming such recognition, and upon it, contingently, from opposing an onerous administration of a succession accruing to him as an acknowledged natural child, and demanding possession.

The opponent, no doubt, had the right to have herself recognized *ex parte*, as is often done in practice, as the natural acknowledged daughter and only heir of her mother, and this would have satisfied the exigency of the collateral relations, of the recognition as a condition precedent to a standing in court. Instead of proceeding in that somewhat clandestine manner, she has boldly asserted her rights contradictorily with them, forced, as it were, by them to do so. She had no other alternative. She has thus enabled the claimants to oppose to her all the legal resistance in their power. They surely can have no cause of complaint.

The two grounds of the opposition of Emelia are not only not inconsistent, but, on the contrary, are perfectly concordant and can be inquired into with favor, as, otherwise, it would be driving her unnecessarily to two actions, which in the present instance are well united and can be determined by one and the same judgment. It is justly said that the law abhors a multiplicity of actions.

To decide otherwise, would be to permit the injurious dilapidation of an estate, under the eye of the party inheriting it, striking him with impotency, for the special and technical reason that he has not been previously recognized as an irregular heir. We do not consider that the law ever intended such a thing.

We are, therefore, of opinion that the opponent was not required, in order to have a standing in court, to be previously recognized judicially as the natural child of the deceased, and that she could file her petition for recognition and oppose the administration in the form in which she has done it.

We deem it unnecessary to pass upon the bills of exception taken to the admission of evidence offered to establish the color of the opponent.

Conceding *arguendo* that the fact charged is established, was it an impediment to the valid acknowledgment of opponent, and has that acknowledgment, if originally prohibited, continued to be such up to the death of Mélasie Hébert?

The first objections raised are : that opponent was not, in fact, acknowledged in writing in one of the modes preseribed by the law, as it stood at the time of opponent's birth in 1854, viz: by article 221 of the Code of 1825, and even then, that such acknowledgment would be invalid, because made by an insane person and because formally prohibited.

It is charged that, as under article R. C. C. 918 (912), natural children were and are called to the legal succession of their mother, when they have been duly acknowledged by her, it follows that, when they have not thus been acknowledged, they are not entitled to inherit from her. It is also charged that the acknowledgment of natural children was and still is required to be made by a declaration executed before a notary public and two witnesses, whenever it shall not have been made in the registry of the birth or baptism of the child; that no other proof was admissible in favor of children of color, and that no such acknowledgment could validly be made in favor of natural children, whose father and mother were incapable of contracting marriage at the time of conception.

Several of the questions presented in these objections or charges have already received judicial attention.

This Court has decided that the requirements of written recognition did not apply to white or colored children descending from white or colored parents; that the rule applied exclusively to children of color, descending from a white father. C. C. 1825; Art. 226, 221, 227, 228; 14 L. 542; 6 An. 129; 6 L. 569; 12 R. 56.

It has also decided that, under article 230 of the same Code, illegitimate children of every description, might make proof of their maternal descent, where the mother was not a married woman.

In Pitot vs. Jobert, 4 An. 305, the Court distinctly said: "The acknowledgment of an illegitimate child, which the law requires to be executed before a notary in presence of two witnesses, when it has not been made in the acts of birth or baptism, is that of the *father*."

This was said in a case in which the question of *color* was not involved. It, therefore, settled that a white child could prove a valid acknowledgment by his mother, otherwise than in one of the modes pointed out by article 221. The Court referred to articles 221 and 230, 6 L. 570.

In the case of Hart, 26 An. 99, the Court distinctly affirmed this ruling. While we refer to this last case, we are not to be understood as admitting its correctness in all other regards.

Had not article 221 contained the further provision declaring that "no other proof of acknowledgment shall be admitted in favor of children of color," and had not article 226 permitted illegitimate children of color to prove their descent from a father of color, *only*, it is manifest

that under the Code of 1825, white and colored illegitimate children would have stood on a footing of perfect equality in that regard, in every respect. But what was the law relative to white children having white parents, was also the law concerning colored children having colored parents. The inhibition against acknowledgment other than written, was directed only against children seeking to prove descent from a white father.

The authorities referred to by the appellees, in 11 An. 59; 6 An. 191; 18 An. 590; 15 An. 590; 15 An. 342; 21 An. 437; are cases in which an adulterous bastard was excluded although acknowledged; in which the inheritance or succession of the father was claimed; where a marriage between a white and a colored person was declared an absolute nullity, not requiring proceeding to be so treated; where a child acknowledged in writing was allowed to inherit from his mother; where a white father, who had acknowledged a colored child, was permitted to inherit from him. They do not show that a child recognized otherwise than in writing by the mother, was not allowed to inherit her succession.

We do not consider as shaking the authority in 4 An. 305, the *dictum* of Mr. Justice Preston in the case of Dugue vs. Caruthers, 6 An. 158, which was not the *opinion* of the three judges composing the majority. Chief Justice Eustis and Justice Slidell merely concurred in the legal results presented in the opinion and decree, while Justice Rost dissented altogether. Whatever was said in the opinion on the subject of the necessity of an acknowledgment by the mother in one of the modes pointed out by article C. C. 221, was, besides, uncalled for and unnecessary in a case in which the question involved was as to the acknowledgment by a father of his natural daughter.

The French authorities mentioned, have no application, as, in France, the law is more strict than ours, and requires that the acknowledgments, not only be made in writing, but, also, be signed by the father or mother.

The restriction contained in article 221 of the Code of 1825, invariably requiring *written* evidence of the acknowledgment of children of color, had previously been repealed and was not in force, therefore, at the death of Mélasie Hébert. It was expressly eliminated from the revised Code of 1870, in which the first part of article 221 was embodied as article 203. The consequence of the repeal has been to confer on children of color, whatever be their descent, the same rights to prove their acknwledgment, as have always been enjoyed by children wholly of white parentage.

The opponent contends, however, that she has proved her acknowledgment by the act of baptism. She contends that she has also proved it otherwise, as she had the right to do.

On the trial, the original entry in the register of baptism was produced in open court by the priest who was the custodian of it. On objection to its being read, a copy of it was made and introduced in evidence in place of the original, notwithstanding objection. The ground of objection was not, that the copy was not properly certified, but that it was the copy of an original under private signature, the signature of which was not proved, and was the act of a third person.

The Code attaches to acts of baptism a high and valuable importance. They are legal evidence to prove the filiation of legitimate children, when kept agreeably to law, or to the usages of the country. R. C. C. 193 (212); 958 (952).

The Code expressly makes a "*transcript*," that is a *copy*, from the register, valid proof for that purpose. It authorizes acknowledgments of natural children to be made by such acts. R. C. C 203 (221), 204 (222.)

It empowers ministers of the Gospel, or priests of any religious sect, to celebrate marriages, and requires them to prepare an act of celebration of such marriages, which is to be signed by the parties, the witnesses and themselves. The acts, when thus drawn up, according to the usages of the country, or according to law, are public acts, authentic acts, which require no proof, and of which transcripts or copies can be legally made. Such acts are entitled to establish *prima facie* the correctness of their contents.

The lower court did not err in dispensing with proof of the genuineness of the entry in the register in which it was made, and which was brought into court by the priest entrusted with the custody of it, and who established the authenticity of the book itself. That was all that was necessary. The copy, made as it was, likewise was properly accepted. That act shows that, on the 12th of April, 1855, Emelia, born on the 18th of May, 1854, was baptized as the natural daughter of Mélasie Hébert.

It is not signed by the mother, but that is no objection. The act is drawn up as similar acts are, according to the usages and rites of the Catholic Church and of the country. Had it been signed by the mother, it would be conclusive against her of the fact of acknowledgment. 12 R. 552.

But it is charged that, as the act is unsigned, the opponent should have proved it to have been made in the form in which it exists, with the authority of her mother, direct or indirect, and that, even then, such authority would amount to nothing, as she, the mother, was insane.

The evidence shows that, although Mélasie was not present at and did not witness the baptismal ceremony, she was in an adjoining room, the communication door of which was open, and that she could see what was going on. The child was presented and held by the sister of

Mélasie. If the latter knew the usages of the church of her creed, she did not ignore that her name, as that of the mother of the child, would have to be given and would be inserted in the act. It is not shown that any objection was ever made by any one to the declaration, contained in the act, that Emelia was the natural daughter of Mélasie.

To prove insanity, a judgment of interdiction was produced, but it proves absolutely nothing on the question of illegal acknowledgment. It was rendered in 1861, while the baptism took place in 1855. It cannot be inferred, from the fact that Mélasie was afflicted with deafness and dumbness, that she was insane. The evidence does not show any fact from which the conclusion can be drawn. It is easy to understand, however, how the co-existence of both afflictions may have created that opinion. The evidence sufficiently shows that Emelia was treated in the family and otherwise as the natural child of Mélasie. There does not seem to be much dispute of the fact, the contention being apparently restricted exclusively to the *legal* effect of the acts of acknowledgment.

The next and last question presented is: Admitting that Emelia is the child of Mélasie, acknowledged by her mother as her natural daughter in a form recognized by law, can such acknowledgment produce effect in her favor, as she was conceived of a mother and a father who were incapable, by reason of color, of contracting marriage at the time of conception?

It is true that, in 1853, when Emelia was conceived, the law prohibited the marriage of white and colored persons (C. C. 95); but that prohibition was not such as could have prevented either the father or the mother from acknowledging her as his or her natural child. She is a bastard, there is no doubt, either because her father and mother could not have contracted marriage, or because her father is unknown, but she was not an adulterous or incestuous bastard, and it is only as to such that the prohibitory law, nullifying acknowledgments of natural children, was levelled.

The difficulty on the subject is not to be solved by article 204 of the R. C. C., referred to by appellees, and which is to the effect that the acknowledgment of natural children shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception, but by article 221 of the Code of 1825, which provided that such acknowledgment shall not be made in favor of children produced by an incestuous or adulterous connexion. Such was the characteristic feature in the case of Fletcher. 11 An. 59.

In Compton vs. Prescott, 12 R. 56, the Court distinctly decided that, although adulterous and incestuous bastards can never be acknowledged, and although there be a legal impediment to the marriage of a white person and of a person of color, the law does not extend to their

illegitimate or natural children. It, therefore, held that such children may prove their acknowledgment by a white father, when the acknowledgment was made as required by article 221; and, in support of that doctrine the Court referred to 4 La. 175, and 14 L. 545. There can be no doubt that, had article 221 of the Code of 1825 read as does article 204 of the R. C. C., quite a different question would have presented itself.

If the validity of the acknowledgment ever was questionable, it has ceased to be such by the changes brought about by the constitutional and legal provisions since enacted. It was a dormant acknowledgment, to produce or not effect, according to the subsequent will of the lawgiver and dependent upon the contingency of its being vivified and validated.

In Girod vs. Lewis, 6 M. 559, the marriage of slaves, which could not produce any of the civil effects resulting from the contract of marriage, was declared to be susceptible of producing such effects on their emancipation. See, also, 6 L. 565.

At the death of Mélasie Hébert, in 1879, there would have existed no legal impediment to her marriage with Emelia's father, even if he was a colored man, and the right and capacity of Emelia to inherit would have to be and is determined by the laws then in force. R. C. C. 950.

A novel and interesting question,—entirely pretermitted by the parties, could have been presented,—a question which rises superior to all the considerations elaborated in this opinion, and which is: Whether, one afflicted, as the deceased was, with deafness and dumbness, and not shown to have known how to read and write, could be required to have been cognizant of the exigencies of the law governing the case?

Would it not be harsh, barbarous, to visit upon the innocent offspring, the consequences of the justifiable ignorance of the law by her unfortunate author? Under the charitable maxim, *Lex neminem cogit ad impossibilia*, would not the law come to the relief of the opponent, and supply in her favor the acknowledgment which her mother is charged with not having made?

It has not been shown that the estate is burdened and requires a liquidation. The opposition to the application for an administrator is well founded. 32 An. 321.

It is, therefore, ordered and decreed that the judgment of the lower court be reversed, and proceeding to render such judgment as should have been rendered,

It is ordered, adjudged and decreed that Emelia Hébert be and she is hereby recognized as the natural duly acknowledged daughter and sole issue and heir of Mélasie Hébert; that her opposition to the appli-

cation for the administration of her mother's estate be sustained and the petition therefor be dismissed.

It is further ordered and decreed that, as such daughter and sole heir, she be put in possession of her said mother's estate, and that the appellees pay the costs in both courts.

No. 1133.

GABRIEL A. FOURNET ET AL. VS. JACOB VAN WICKLE.

ON THE MOTION TO DISMISS.

An Appeal taken by Motion in open court, being defective because the amount of the bond was not fixed by the judge, cannot be subsequently perfected by an order fixing such amount, rendered at chambers on the Petition of Appellant.

APPEAL from the Twenty-first Judicial District Court, parish of St. Martin. *Fontelieu*, J.

Jos. A. Breaux for Plaintiffs and Appellees.

H. N. Ogden and *A. B. Phillips* for Defendants and Appellants.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. This appeal is taken from a judgment annulling a tax-sale.

Plaintiff and appellee, Mrs. M. Bienvenu, moves for the dismissal of the same on the ground that no citation of appeal was served upon her.

The record shows the following facts and proceedings bearing on this motion. On motion of appellant's counsel, in open court, on November 30th, 1880, the following order was made:

"In this case, on motion for defendant, a suspensive and devolutive appeal, returnable at the next term of the Supreme Court at Opelousas, is granted; bond for devolutive appeal fixed at $200." On the 11th of December following, the defendant presented to the judge, at chambers, a petition for a suspensive appeal, which was granted by the judge, who fixed the amount of the suspensive appeal bond at two hundred dollars.

In that petition appellant did not pray for citation of appeal on the appellees, and none was served.

In his oral argument before this Court, his counsel argued that the order for his suspensive appeal having been granted in open court, no citation of appeal was necessary; and that the object of his petition at chambers, was to supply the deficiency of the order granted in open

court, in which no amount was fixed for the suspensive appeal bond, the appeal being from a judgment which was not a moneyed judgment; and that his petition must be construed in connection with, and by reference to, the order made in open court.

It is clear that a deficient order rendered in open court cannot be modified, extended, or perfected by any proceeding at chambers, not more than an order or decree rendered in open court could be rescinded or annulled *ex parte* by the judge at chambers. It, therefore, follows that the order in open court, and the order predicated on defendant's petition for an appeal at chambers, must be interpreted as two separate and distinct proceedings; the effect of each must be tested on their respective merits, and each must stand on its relative and intrinsic strength, or fall on its relative and intrinsic weakness. The two cannot be joined or combined for the purpose of making together a perfect and undivided unity. Appellee must elect on which of the two orders he rests his appeal. If he elects to abide by the order made in open court, so as to escape the fatal omission of a citation of appeal, he comes under an order granting him a suspensive appeal from a judgment other than a moneyed judgment, without fixing the amount of the bond, without which he could not perfect his appeal. 6 N. S. 316; 12 R. 187. If he relies on his petition, presented and acted upon at chambers, which is seemingly his intention, by the fact that his appeal bond refers to and is predicated upon the orders thus granted, he is met by the omission of a citation of appeal, for which he did not pray, and for which omission he is clearly responsible. 13 La. 50; 10 An. 650; 17 An. 74; 21 An. 618; 32 An. 618.

In his petition for a suspensive appeal, the defendant makes no mention of the order rendered in open court, which he had manifestly abandoned for the defect hereinabove mentioned; and his right to maintain this appeal must be tested under the proceedings predicated upon his petition; hence, the motion to dismiss the present appeal must prevail.

This ruling must not be construed as a bar to appellant's right, if any he has, to perfect and prosecute the devolutive appeal granted to him in the alternative by the order rendered in open court on the 30th of November, 1880, and we render this decree without prejudice to such right.

It is, therefore, ordered that the present appeal be dismissed at appellant's costs.

No. 1138.

THE STATE OF LOUISIANA VS. E. HORNSBY.

The Clerk of court and two jury commissioners, forming a quorum under the law, the *venire* drawn by them will not be considered illegal for want of the presence of the other two commissioners.

The refusal of the judge to grant a continuance to the accused to procure certain witnesses, was, under the circumstances of the case, within his sound discretion.

A juror is competent, though he answered upon the direct examination, that he had formed an opinion respecting the guilt or innocence of the accused, if, on examination by the judge, it appears from his answers that his opinion was formed from rumors, that he is without bias or prejudice, and that he can decide the case according to the evidence, without regard to what he previously heard.

APPEAL from the Twenty-first Judicial District Court, parish of Iberia. *Fontelieu*, J.

The State and the Defendant unrepresented in this Court.

The opinion of the Court was delivered by

TODD, J. This case was before us at our last term, on an appeal taken by the defendant from a sentence condemning him to a life imprisonment in the penitentiary for the crime of murder. The case was remanded for another trial. That trial was held in the court below, and the defendant was convicted of manslaughter and sentenced to five years' imprisonment at hard labor in the penitentiary, and has again appealed.

A voluminous transcript of appeal has been filed in this Court, but, remarkable to say, neither the State nor the accused has made any appearance here by counsel, and we have not the benefit of an argument, either oral or by brief, from either side.

Under a strict construction of the law, and the rules of this Court, the fact mentioned—of the non-appearance in this Court of both parties by counsel or otherwise—might imply an abandonment of the appeal; but construing the right most favorably to the accused, and disregarding the omissions that might be considered as impeding it, unaided by counsel and uninformed as to the special grounds of relief relied on, we have made a close and critical examination of the entire record, to ascertain if there existed any errors or irregularities in the proceeding, requiring the setting aside the judgment and sentence of the lower court.

The defenses made in the court of the first instance consist:

1. Of a motion to quash the *venire*.

2. Motion for a continuance.

3. Alleged incompetency of several members of the jury that sat upon the trial of the case.

4. Alleged errors in the rulings of the judge touching the admission and rejection of evidence.

5. Alleged absence of prisoner at certain stages of the trial and proceedings relating thereto.

These defenses are embodied in motions to quash and in arrest of judgment, and bills of exceptions to the rulings of the Court, all of which we will consider in their order.

First—The *venire* was drawn on the 6th December, 1880. The trial took place in May following. At the general drawing in December and the supplemental one in March following, the clerk of the court and three citizens, appointed by the judge, were present, acted and constituted the jury commission.

The law provided that a commission should be composed of the clerk and four citizens, appointed by the judge, but authorized *three* to act in the proceedings relating to the duties of the commission. Considering that in this instance the clerk and *three* citizens were present and acted, we think the law was substantially complied with. The failure of the judge to appoint a fourth commissioner, or the failure of one or even two commissioners to attend a meeting of the commission, when two commissioners, with the clerk, under the law, form a quorum for business, as expressly declared, we do not consider as an irregularity sufficient to vitiate the proceeding. In this instance, the reason of the law was fully met, and, in the absence of a nullity pronounced in the law itself on account of the omission suggested, we must hold that the motion to quash the *venire* for this irregularity was properly overruled. The *venire* was not stricken with nullity by reason of the failure of an officer to discharge his duty in one particular. The law does not attach such a consequence to an omission of this kind. There is in the record nothing that shows affirmatively the non-performance by the clerk of the special duties assigned him in the proceedings of the commission, touching the making out the list of jurors, &c. He is presumed to have discharged this duty, and the presumption is not rebutted.

Second—We are not prepared to say that the judge erred in refusing the continuance. Had such application,—complete as to form, as this must be conceded to be,—been made under certain other conditions and circumstances, we have no hesitation in saying that it should have been granted. For instance, had the prisoner never been tried before, and had this application been seasonably made before a first trial, it might be considered an abuse of the discretion with which he is clothed in the matter of continuances for the judge to have refused the continuance under such a state of facts; but when we consider that the accused had been under arrest for at least a year and a half; had been

once tried, and, previous to his first trial, had made an application for a continuance on the identical grounds contained in his last motion,—which were, that certain witnesses named in both applications, could not be, or were not served with subpœnas,—we see at once that circumstances were presented, that not only authorized, but called for the exercise of the judge's discretion. We cannot say, under this showing, that it was not soundly exercised. He had just reason to conclude that the proper diligence had not been used, and that the witnesses would never be found and their attendance never procured.

Third—Two of the jurors called first, said, upon their direct examinations, that they had formed opinions respecting the guilt or innocence of the accused; but, on examination by the judge, it appeared from their answers that their opinions had been formed from rumors; that they were without bias or prejudice, and that they could decide the case according to the evidence that they would hear on the trial, without regard to what they had previously heard. Under the settled jurisprudence on this point, they were competent jurors. 14 An. 462, 693; 23 An. 148; 29 An. 642; 32 An. 1241.

Fourth—In regard to the rulings of the judge in relation to the evidence, it is only necessary to say, that we have scrutinized the many bills of exceptions touching these rulings, and find none deserving of consideration, as presented to us by the record, save two, and those relate to the exclusion of the testimony of an absent witness, given on a preliminary examination, on the same charge for which the accused was being tried, and a written report of experts in writing in relation to the death of the deceased, and its causes. Neither of these documents are in the transcript, although stated in the bills to be annexed respectively thereto. Without an inspection and examination of them, we are not prepared to say they should be admitted. The judge assigns, as a reason for excluding the previous testimony of the absent witness, that he had never signed his statement made at the preliminary examination, and was not proved to be beyond the reach of the process of the court. These considerations justified the ruling.

Fifth—In regard to the alleged absence of the prisoner when the case was set for trial, there is no minute of the court showing this fact to be found in the record. There is no entry, on the day stated in the bill, of any proceeding of the court. During all the other stages of the prosecution, of any importance, the record shows the prisoner *was* present.

With this review of the case, we conclude there was no error in the proceedings; and the sentence and judgment appealed from are affirmed.

No. 1137.

MANUEL A. MONTEJO VS. M. T. GORDY, SHERIFF, ET ALS.

If the mortgage creditor is entitled to executory process against his mortgagor, he has the same right against the vendee of the latter, even if his act of mortgage does not contain the pact *de non alienando*, but, in that case, he must proceed, as against third possessors' by the hypothecary action proper, after the thirty days demand and ten days notice. provided for by the Code of Practice. And the fact that such mortgage creditor has obtained judgment against the original mortgagor, does not deprive him of the right of executory process, in the hypothecary action, against the mortgagor's vendee.

APPEAL from the Nineteenth Judicial District Court, parish of St. Mary. *Goode*, J.

Foster Bros. for Plaintiff and Appellant.

H. D. Smith for Defendants and Appellees.

The opinion of the Court was delivered by

LEVY, J. Henderson Crawford, one of the heirs of H. Crawford, deceased, executed a mortgage, on the 9th of December, 1865, in favor of Martin Conrad, to secure a note for $3000, in favor of said Conrad, signed by said Henderson Crawford and Larive Crawford, *in solido*, the mortgage being upon "his entire interest in the estate of his father, to wit: one-eighth undivided interest in what now remains of said estate, consisting of the sugar plantation belonging to said estate," describing its quantity, location, boundaries, etc. Suit was brought on this note by Conrad and, on the 1st of May, 1880, there was judgment in the District Court of St. Mary against the makers of said note and recognizing the mortgage aforesaid as bearing upon and affecting said mortgaged property. In 1869, the widow and heirs of H. Crawford, deceased, executed a mortgage upon the whole of said plantation in favor of P. J. Pavy, to secure a certain debt due by them; this debt was transferred to M. A. Montejo with full subrogation of the mortgage securing it, and the plantation thus mortgaged was seized and sold under executory process, in the suit (order of seizure and sale), No. 6962, of the docket of the District Court, parish of St. Mary, of M. A. Montejo vs. Henderson Crawford et als., and Manuel A. Montejo and L. F. Generes became the purchasers. After the judgment was rendered, on 1st May, 1880, in favor of the administrator of Martin Conrad, thirty days notice and demand for payment was given to the mortgagor, Henderson Crawford, and thereafter ten days' notice and demand on the third possessors. The administrator of Conrad then filed his petition, setting forth his judgment on the mortgage note with recognition of his mortgage, the adjudication to Montejo and Generes of the property affected by Conrad's mortgage, the amicable legal demands of thirty and ten days on the hypothecary debtor and the third possessors, prayed for citation of said third posses-

sors "as the law directs," and that "executory process issue and an order of seizure and sale be directed to the sheriff of St. Mary parish, commanding him to seize and sell for cash after the requisite legal delays and formalities," the mortgaged property. On this petition the District Judge granted the following order: "Let executory process and an order of seizure and sale issue as prayed and according to law." Notice of the order of seizure and sale and demand for payment within three days was directed to Manuel A. Montejo and Y. or F. J. Montejo and the executor of L. F. Generes, which was served on F. J. Montejo and said executor. Under the writ of seizure and sale the undivided eighth interest was seized, and notice of seizure made on F. J. Montejo and the executor of Generes. Under the writ the sheriff seized and advertised for sale, the following: "as the property of M. A. Montejo, viz: the one undivided eighth of the following described property, to wit: that certain tract of land or sugar plantation lying and being situated in the parish of St. Mary, State of Louisiana, containing about seven hundred and sixty arpents, superficial measure, having a front on the Bayou Teche of nine and one-half arpents, with a depth that belongs to the same, bounded below by lands of William and A. L. Hayes, with all the buildings and improvements thereon situated, rights, ways, appurtenances thereunto belonging." The property thus seized and described, was advertised for sale.

M. A. Montejo thereupon brought this injunction suit and the sale was enjoined. Plaintiff's grounds of injunction are: That Henderson Crawford could not grant a mortgage upon his right of inheritance in the succession of his deceased father; that no portion of the property itself, the same belonging to the estate of his deceased father, was mortgaged, and never had been accepted by said Henderson; that "said pretended mortgage never had any legal existence or vitality, is null and void and of no effect against third parties, on account of vagueness, uncertainty and illegalities patent upon its face." Further, "that the order of seizure and sale and the proceedings thereunder are illegal, null and void, and unwarranted in law, in this, that the plaintiff (administrator) in execution, has mistaken his remedy; that, under the law, he was not entitled to the executory process or any order of seizure and sale, but, if he had any cause of action against petitioner, he should have resorted to the hypothecary action proper; that, having a judgment recognizing simply a mortgage, he could only proceed against the third possessors by the hypothecary action; that upon the original mortgage no executory process could issue and since said mortgage has been merged in a judgment, his remedy was either by *fi. fa.* against the judgment debtor, or, by the hypothecary action against the third possessor. Further, that even if he could have resorted to the executory

process, there is want of proper service, it having been made on F. J. Montejo personally, and not as agent; that the advertisement is defective for want of definite description of the property seized. The plaintiff in injunction claimed $300 damages, for attorney's fees, and $500 special and exemplary damages, and he prayed for a decree declaring the nullity of Conrad's mortgage, and for an order directing it to be cancelled and erased from the records. The defendant in injunction in his answer, made a general denial and averred that plaintiff was estopped from denying the validity of respondent's mortgage or the mortgagor's capacity to hypothecate the property mortgaged in his, plaintiff's, favor. He admits that the notices to pay and of seizure were served upon Frank J. Montejo, the agent of plaintiff and in possession of the mortgaged property, and avers the sufficiency of said notice; he denies the right of plaintiff herein, to enquire into the sufficiency of the evidence on which executory process issued; and prays for dissolution of the injunction with $250 damages, for attorney's fees, and 20 per cent exemplary damages. There was judgment in the lower court rejecting plaintiff's demands and dissolving the injunction, and against the defendant on his reconventional demand for attorney's fees and damages, reserving to him the right to sue on the injunction bond for damages sustained by him, growing out of the injunction. Plaintiff, M. A. Montejo, appeals.

In order to come to a proper determination of the fundamental issue in this case, we are called upon, first, to decide whether the judgment in this case has been rendered in a proper proceeding, or, in other words, whether the judgment is binding on the plaintiff in injunction, whose property is sought to be sold under the judgment rendered in the proceedings. The plaintiff in that suit, holder of the first mortgage on property which had passed into the ownership and possession of a third possessor, obtained judgment against his debtor, with recognition of his mortgage. The third possessor had not assumed the payment of the prior mortgage, which did not contain the pact of non-alienation; between him and the plaintiff, first mortgagee, there existed no privity and there rested on him no personal obligation. We are of opinion that the proceeding by executory process of seizure and sale does not lie in this case. It is true, as contended by counsel of appellee, that the sufficiency of evidence to authorize the order of executory process cannot be examined on an injunction and the remedy in such cases is by appeal, 26 An. 709; 8 An. 23; 20 An 256; and, therefore, we can, in that regard, enter upon no such examination. But it is competent for us to inquire into and pass upon the question as to whether the order and proceedings themselves are authorized by law and binding. The conclusion which we have reached and above expressed, is supported by numerous authorities. In 4 La. 125, it was said: " There is

no allegation of privity of contract between the parties (one the original creditor and the other a third possessor). The defendant (third possessor) can only be rendered liable in an hypothecary action."

In Waddill vs. Payne & Harrison et al., 22 An. 134, it was held that, where a third party has purchased real estate, which is subject to a special mortgage without the stipulation therein of the pact *de non alienando*, the holder of the mortgage can only enforce it against the third possessor, by the hypothecary action. In Taylor vs. Pipes, 24 An. 251, the same doctrine was held, and the Court referred to the case reported in 9 R. 69, and said that therein "the precise question now in controversy was decided, to wit: whether the purchaser of mortgaged property, after suit or *judgment* against the original mortgagor, is entitled to the rights of a third possessor and can only be proceeded against conformably to the rule stated in articles 68 and 69 Code of Practice. It was there held that, 'a purchaser of property subject to a mortgage, in possession, is entitled to the rights and *privileges of a third possessor, though a judgment had been obtained by the mortgagee against the mortgagor, but no execution had issued before the purchaser took possession under the sale; it is only when the mortgage contains the pact de non alienando that the third possessor is not entitled to notice.*'" The reasoning of the Court, of which Mr. Justice Wyly was the organ, in the case referred to, *Taylor vs. Pipes*, is clear, full and convincing on the point at issue.

In 12 La. 34, the Supreme Court decided that where a creditor demands the execution of a judgment rendered by a tribunal different from that within whose jurisdiction the execution of it is sought, he may resort to the executory process; but this process cannot issue from a court within the same territorial jurisdiction. The party must resort to his *fieri facias* on his judgment.

Article 709 of the Code of Practice, provides the remedy for the prior mortgagee: "The hypothecary action lies against the purchaser of property seized, which is subject to privileges or mortgages in favor of such creditors as have said privileges and mortgages, in the same manner and under the same rules and restrictions as are applicable to a third possessor of a mortgaged property."

In 4 An. 270: "Where an act of mortgage does not contain the pact *de non alienando*, and the property is in possession of *a third person, no judgment can be rendered for its seizure and sale in an action against the mortgagor alone.*" *C. P. 68; C. P. 69;* 26 An. 370.

In 3 An. 227, it is held: "Where mortgaged property is in possession of the mortgagor, one expressly subrogated to the rights of the mortgagee may proceed against it, *via executiva*. But, where an act of mortgage contains no clause *de non alienando* and the property is sold

by the mortgagor to a third person, neither the mortgagee, nor any one subrogated to his rights, can proceed against it by order of seizure and sale. The creditor must resort to an hypothecary action."

The proceeding in this case is on its face, and avowedly, one of executory process. Certain prerequisites to support the hypothecary action have been complied with, but the action itself was not instituted or conducted as an hypothecary action *via ordinaria*, nor has it been converted into such, so as to support a judgment in such action. The third possessor was not cited in the suit and the judgment was not obtained contradictorily with him. We, therefore, find that the proceeding *via executiva* did not lie in the case and that *via ordinaria*, the proper one, has not been had.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered by the court *a qua*, it is ordered, adjudged and decreed that there be judgment in favor of plaintiff, perpetuating the injunction herein, without prejudice to the defendant mortgagor to prosecute his claim in other and proper proceedings. Appellee to pay the costs of both courts.

ON APPLICATION FOR REHEARING.

FENNER, J. A re-examination of this case has convinced us that our original opinion herein was erroneous.

The views expressed and the train of reasoning which led up to the conclusion that the remedy for enforcement of the mortgage in the suit enjoined was by the hypothecary action proper, were certainly conclusive. But we assumed that in no case, could executory process issue in a hypothecary action proper, but that, in all cases, such action must be conducted by citation and proceedings *via ordinaria*.

This assumption, we are now convinced, is not sustained by law.

The hypothecary action is a real action, the object of which is to have the property hypothecated seized and sold for the payment of the debt. C. P. 61.

When this action is brought against a third possessor of the hypothecated property, for the purpose of compelling him to give up the property, or to pay the debt, or, in default, to have the property seized and sold, it is called the hypothecary action proper. C. P. 68, 69.

Every hypothecary action brought against a third possessor, who has not personally assumed the debt, falls within the designation of hypothecary action proper.

Article 744 C. P. makes it clear that executory process "may be pursued, not only against the debtor or his heirs, but also against the

third possessor of the thing subjected to it according to the forms prescribed" in articles 68 to 74 of that Code.

Therefore, if the mortgage creditor is otherwise entitled to executory process, the fact that his proceeding is against a third possessor does not deprive him of that right.

To entitle the creditor to executory process, it is only necessary, so far as conventional mortgages are concerned, that his rights should arise from an act importing confession of judgment. C. P. 732.

Proceeding on such a mortgage, the only limitation on his right to executory process against a third possessor, lies in the condition imposed of complying with the forms prescribed in articles 68 *et seq.* C. P; C. P. 744.

These forms are thirty days previous demand from the original debtor; the proper affidavit appended to his petition; and ten days notice of the demand to the third possessor. C. P. 69, 70.

No other forms or conditions are imposed. Nothing is said about citation, and, indeed, the proceeding by executory process is exclusive of the idea that citation should be necessary or proper—the notices provided being a substitute for, and equivalent of, citation.

The absence of the *pact de non alienando* from the mortgage has no effect upon the proceeding against the third possessor. The only effect of that pact is to entitle the creditor to disregard all alienations and to pursue the property by direct proceeding against the original debtor.

Its absence, provided the act imports confession of judgment, only imposes upon the creditor the necessity of directing his executory proceedings against the third possessor directly and of giving the additonal notices required by law; but, these requirements having been complied with, he is none the less entitled to executory process.

Such is the express doctrine of Wilcoxon vs. Markell, 8 An. 460, and is clearly derived from the textual provisions of the Code of Practice, as we have shown.

In the case before us, the creditor held a mortgage importing confession of judgment, and so expressly alleged in his petition. The fact that he had obtained a recognition of his mortgage by judgment against the original debtor, if it did not enlarge, certainly could not diminish, his rights against the third possessor of the thing mortgaged.

The proceedings exhibit the demand, affidavit and notice, in strict compliance with law, and we think he was entitled to the remedy invoked.

The other grounds of injunction are untenable.

F. J. Montejo's agency for the plaintiff was expressly alleged in the petition and proved by authentic act, and the service of the ten days notice on him was sufficient.

The description of the property in the advertisement is sufficient to identify it and, taken in connexion with the proceedings, is sufficient.

The other grounds of injunction require no further notice than was given in our original opinion and suggested in the present one.

In altering our decree upon this application, we shall reserve to the appellant the right of applying for rehearing as if this were our original decree.

It is, therefore, ordered that our former decree herein be annulled and set aside.

And it is now ordered, adjudged and decreed that the judgment appealed from be affirmed at appellant's costs.

No. 1135.

WILLIAM F. ANDERSON vs. CLÉOPHAS COMEAU.

The seizure of immovable property vests in the sheriff the right to receive the fruits or rents from the date of seizure, for the benefit of the seizing creditor.

An unrecorded act of lease of real estate produces no legal effect as to third persons.

The lessee of immovable property, under an unrecorded lease, is liable to the seizing creditor for rent accruing after seizure, though he has paid it to the lessor by anticipation, or furnished negotiable notes for it.

The lessee of immovable property, under an unrecorded lease, in case of seizure, has the right to claim the dissolution of the lease; but, if he remains in possession, a tacit reconduction results from it in favor of the seizing creditor.

Decision in 30th An., 436, affirmed.

APPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

John N. Ogden for Plaintiff and Appellant:

This case involves questions of fact principally.

A leases property to B for a stipulated amount per annum. The whole amount of the lease is paid by B in advance. B subsequently sub-leases the property to C for a stipulated price, to be paid to B by C. The judgment creditors of A cannot seize the rents arising from the lease in favor of B without alleging and proving fraud.

The seizure of the rents accruing in favor of B under a *fi. fa.*, on the part of the creditors of A, without notice to C of the seizure, will not justify C in refusing to pay the rents to B.

It is elementary that until the assignee notifies the debtor of the assignment made to him the assignor is not divested of the credit which he assigns.

A simple transfer does not divest, and it is necessasy to notify the party of the transfer; from which it follows, that before notice, the debtor may legally pay to the assignor, his creditor.

Henry L. Garland for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER J. Thomas C. Anderson owned lot No. 5 in the town of Washington, with a large brick store and other improvements thereon.

He had leased from the town of Washington a certain piece of land on the Bayou Courtableau for a term of years expiring in 1884, at a rent of fifty dollars *per annum*, on which there had been built a warehouse.

On March 11th, 1879, Thomas C. Anderson executed a written lease of the two properties above mentioned, to his son, William F. Anderson, for the term of one year, at a stipulated rent of twelve hundred dollars, recited in the lease to have been paid in cash.

On March 15th, 1879, by writing endorsed on the instrument, Wm. F. Anderson transferred all his rights and interest in the lease just mentioned to Cleophas Comeau, for the consideration of $1400, stated in the transfer to have been paid in cash.

On the 29th of March, 1879, under writs of fi. fa. issued by certain judgment creditors of Thomas C. Anderson, who are intervenors in this case, the sheriff of the parish seized and took into his possession, the town lot No. 5 with the improvements, belonging to said Anderson, of which seizure notice was duly served upon the latter; and also seized the right, title and interest of Thomas C. Anderson in and to the lease from the town of Washington to him of the land on which the warehouse stood, and also his right, title and interest in and to the warehouse itself. Of this last seizure notice was duly served, not only upon T. C. Anderson, but upon Comeau, who was then in possession under his sublease.

At the time of seizure the lease from T. C. Anderson to W. F. Anderson, transferred by the latter to Comeau, had not been recorded, and record was not made thereof until the 9th of June following.

The sheriff was proceeding with the advertisement and sale of the property seized, when arrested by an order of court in a suit for respite instituted by Thomas C. Anderson against his creditors. This stay remained in force, and maintained the seizure of the property, during the entire term of Comeau's lease.

This suit having been brought by William F. Anderson against Comeau to recover the consideration due under the transfer of the lease, which, it is admitted, was not paid in cash as falsely stated in the transfer, Comeau answered that, under the real agreement between himself and plaintiff, he took the lease at the rent of $1200 stipulated therein; that he was ready to pay the rent due by him to whomsoever the Court might find entitled thereto; but that he had been notified by the seizing creditors of their claim that his rent should be paid to the sheriff for their benefit.

The seizing creditors intervened in the suit, and reciting the facts of their seizures, as above set forth, they pray that the defendant be condemned to pay to them. The issue is, shall defendant pay the rent accruing after the seizure to the plaintiff or to the intervenors?

The luminous opinions, original and on rehearing, in the case of Summers vs. Clark, 30 A. 346, conclusively settle the principles of law which govern and decide this case. These are:

1st. That the seizure of the immovable property of the judgment debtor vests in the sheriff the right to receive, for the benefit of the seizing creditors, the fruits, rents and revenues of the property from the date of seizure. C. C. 466; C. P. 656.

2d. That Arts. 2264 and 2266 of the Rev. Civil Code—providing substantially that all sales, contracts, judgments and acts, affecting or concerning immovable property, not recorded according to law, shall be utterly null and void except between the parties, and without any effect as to third persons, apply to leases of real estate as well as to other contracts.

3d. That the possessor of immovables, under such an unrecorded lease, even though he may have paid, in advance, the rent for the entire term, in cash or negotiable notes, is vested thereunder with no rights whatever as against a seizing creditor of the lessor.

4th. That, in such case, the effect of the seizure, as between the lessor and the lessee, by reason of the disturbance of the enjoyment of the thing leased by the latter, is to dissolve the lease, and to give him the right to abandon the property, and to claim from the lessor the restitution of the rents which may have been paid in advance.

5th. That if, instead of abandoning the property, the lessee, with the consent of, or without opposition by, the sheriff or the seizing creditor, elects to retain possession, after the seizure, without change of terms, this operates a tacit reconduction or attornment, in favor of the seizing creditor, during the term of the seizure, at the same rate of rent. Rev. C. C. 2688, 2689; 5 A. 300, 174.

These principles, stated in our own language but legitimately deducible from the decision above referred to, are, in our judgment, scientifically correct, and, when applied to this case, they obviously dispose of it, upon the undisputed facts, and without the necessity of solving the issues raised in the evidence as to the real relations of Thomas C. and William F. Anderson, under the lease.

It is sufficient to say that, at the time of seizure, the property was unaffected by any recorded lease, and, *quoad* the seizing creditors, stood, therefore, precisely as if it had not been leased at all. The effect of the seizure was to vest the creditors with the absolute right to the subsequent rents, the amount of which is not disputed.

Comeau, no matter whose lessee he was, was released from his obligations to his lessor, by reason of the disturbance of his enjoyment of the thing leased, and the suggestion that he may be compelled to pay twice, both to the plaintiff and to the intervenors, is abhorrent to common sense as well as to justice.

The complaint, by Anderson, of Comeau's failure to record the lease, cannot serve as the foundation of any legal right against the latter. It is not pretended that there was any agreement between him and Anderson that he should record it, and the law imposed upon him no such obligation.

The objections urged to the seizure of the town lot, on the ground that notice was not served on Comeau, has no force. The notice to the seized debtor, and the taking possession by the sheriff, were the only steps required by law. The seizures were, in all respects, perfect and complete.

The judgment of the lower court allowed the plaintiff eighteen dollars and decreed the balance of the rent to the intervenors. The ground upon which the allowance to plaintiff was made, is not stated in the judgment or opinion, but it is suggested that it was based on the rent accruing between the date of the transfer of the lease to Comeau and the date of the seizure. Appellant complains that, in estimating this amount, the judge committed an error of calculation—the period being fourteen days and amounting, at the rate of $100 per month, to $46 62, which would entitle him to an additional allowance of $24 62.

This error of calculation, if it be such, should manifestly have been called to the attention of the lower court. Not having done so, plaintiff cannot take advantage of it to amerce the appellees in costs considerably exceeding the amount of the error. The maxim *de minimis* applies. Kohn vs. Schooner, 5 A. 25.

The judgment appealed from is, therefore, affirmed, at appellant's costs.

No. 1124.

THE STATE EX REL. T. W. NELSON VS. THE POLICE JURY OF THE PARISH OF ST. MARTIN.

The Relator, having a judgment against the Parish of St. Martin for certain warrants, drawn under a Resolution of its Police Jury that they should be paid from the taxes of the years 1865, 1866, 1867 and 1868, seeks by Mandamus to compel said Parish to levy now a sufficient tax, according to the rolls of the current year, to pay said judgment. *Held* that the Relator's right is limited to the terms and conditions under which the warrants were issued, and that he is not entitled to the levy of the tax prayed for.

APPEAL from the Twenty-first Judicial District Court, parish of St. Martin. *Fontelieu*, J.

Breaux & Hall for the Relator and Appellee:

First—Notice to counsel of the day of assignment merely, of case pending, is sufficient. Mooney vs. Hopper, 3 L. 445; Cooley vs. Seymour, 9 L. 276.

Second—Counsel coming into case, bound by agreement in writing made by counsel having

control of case at date anterior, district attorney was, therefore, bound to try the case as requested.

Third—The case was remanded simply to ascertain whether the original case of Nelson vs. St. Martin was founded upon a contract or not; it is now too late to urge any defense which could have been urged on the trial of the case. 32 An. 884; 28 An. 578.

Fourth—As to all defenses now attempted to be urged, the plea of *res adjudicata* prevails. 28 An. 578.

Fifth—Mandamus should be made peremptory. 32 An. 747; 96 U. S. 607.

C. H. Mouton, District Attorney; *Alcibiades DeBlanc*, *J. E. Mouton* and *Edward Simon*, for Defendants and Appellants:

First—An order to show cause why a mandamus should not be made peremptory is a rule, and the defendant is entitled to notice under article 841 C. P.

Second—The judgment of the Supreme Court remanding this case was equivalent to an indefinite postponement, and the defendant was entitled to notice of the order fixing the case to be tried in chambers, in the same manner as if plaintiff had taken a new rule. No one can be forced to go to trial without notice or citation.

ON THE MERITS.

Third—The act of the president of a police jury is not the act of the police jury, and the consent of the president of a police jury given to a contract is not the *consent* of the police jury, unless authorized or sanctioned by that body in the manner provided for by law.

Fifth—Police juries cannot appropriate money and levy taxes, except it be by an ordinance or resolution; and all such ordinances or resolutions must be signed by their president and attested to by their clerk; until then it is but a mere project.

Fifth—There can be no contract without the concurrence of the consent of the contracting parties.

Sixth—The certificate of a clerk *pro tem.* of a police jury that a certain resolution or ordinance of a police jury exists, is not conclusive of the fact, and is of no weight in presence of most positive proof to the contrary.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relator applies for the levy by *mandamus* of a special tax, by the defendant, to pay a judgment in his favor for $4500, and interest, against the parish of St. Martin.

Several times has the relator already submitted his grievances to this Court. 28 An. 578; 30 An. 1103; 32 An. 884.

The case was before us at last term. We found the relator in presence of the defense, that the law under which he sought relief had been repealed, and that the proceeding was unwarranted. To this attack he replied that the repeal was inoperative, as his judgment rested on a contract, shielded by the Constitution of the United States, which protects the obligations thereof from all impairment.

There was no allegation of a contract in the petition. Still, with a view to afford the relator an occasion to amend, we thought it our duty "in furtherance of the ends of justice, to remand the case, in order that the relator may have an opportunity of establishing that his judgment is founded on a contract, if such be the case, and that the defendant

may adduce such further evidence and make such other defenses as the nature of the suit may require." 32 An. 888.

We did not mean or say, that the case in which the judgment relied upon was rendered, should be reopened, and that the issues *involved* and *determined* should be tried *de novo*. We would have been powerless to do so. We merely intended to permit the relator to allege and prove a material fact, in support of the present proceeding, viz: a protected contract.

On the trial, on the remandment, he, however, assumed to prove, in the absence of averment, the existence of the contract invoked, not only by the record in which the judgment was obtained, but also by supplementary evidence, to the introduction of which objection was made, the propriety of which we deem it unnecessary to pass upon.

Conceding *arguendo*, that the relator has averred that his judgment is predicated on a contract; that the record in the case mentioned and the additional proof establish a contract (questions upon which we express no opinion), we are irresistibly driven to the inquiry, whether the relator, under his judgment and under the contract, is entitled to the special tax which he demands, over and above the constitutional limit, if a transgression be necessary.

The judgment rendered has become definitive. It constitutes *res judicata*, and can no longer be impugned, as to issues involved and determined. Whatever issues it settles, are irrevocably conclusive upon the parties to it; but what is it, that was at issue; what is it that it adjudicates; what is it that it is based upon?

The question presented for solution was: shall the plaintiff recover judgment for the amount claimed, and shall a tax be levied to pay such judgment? The issue was not, whether the claim was based on a contract or not; there was no contention on the subject; and the judgment does not pass upon any such question. It is true that the defendant might, if a contract existed, have resisted the prayer for the levy of a special tax, and thus raised an issue as to the existence and validity of such contract. The defendant did not do so, and no issue was formed and determined on that subject. The plaintiff and the court which rendered the judgment, acted, no doubt, under the impression that the law then in existence required that a provision should be made at the time plaintiff's claim was liquidated,—for its payment by the levy of a tax. R. S. Secs. 26, 28, 29, 30, 47, 48 and 49.

The judgment, therefore, was simply for a sum of money and for a tax to pay it. It would have necessarily been the same, had the suit been one for damages, founded on no real contract at all.

We, therefore, remanded the case for information as to the consideration of the judgment, in order to enable us to determine the

question of impairment of the obligation of a contract, raised by the relator.

But, were it not so, the right of the relator to a tax has been by himself submitted, as *res nova*, for determination.

By the judgment rendered in 1873, liquidating his demand, a tax was ordered to be levied to pay it, at *a sufficient* rate per cent. upon the assessment of the *current* year.

It is manifest that this judgment has not been satisfied by payment or executed by the levy of the tax directed, otherwise why the present proceeding?

By the lapse of time and the force of circumstances, it is clear that this judgment, as regards the levy of the tax, has ceased to be executory, and has passed out of existence, inasmuch as the defendant cannot, under its terms, be required to do *nunc*, in 1881, what it directed to be done *tunc*, in 1873.

By the present proceeding and by his course in the lower court, in adducing evidence other than the record in the case in which the judgment was rendered, the relator has admitted his legal inability to have that portion of the judgment for the tax, *vi terminis*, executed, and its *consequent* caducity. He has abandoned all pretensions to its enforcement, and seeks now at the hands of the Court another and different judgment, allowing him a tax of —— per cent. on the property of the parish, according to the assessment rolls thereof for the *current* year, to pay his judgment of 1873. He has thereby reopened the question of his right to such a tax, and of the existence, validity and extent of his claim under *the contract.*

The judgment of 1873 fixed no percentage rate of assessment, and so was not executory, as it left the *quantum* of the rate within discretion. The judgment appealed from is definite, and directs a levy of ten mills, if necessary, over and above the *quantum* of taxation, limited by article 209 of the Constitution.

As the relator has undertaken, not only to show a specific contract, but also the nature and extent of that contract, he has opened the door to the defendant, to establish that, under the terms of such contract, he is not entitled to the remedy sought by him.

What is the evidence now before us on the subject?

We gather from the record, as it is now presented, that the judgment was obtained on two notes or bonds or obligations signed by the president of the police jury of the parish of St. Martin, on the 5th of October, 1868, purporting on their face to have been issued in pursuance of authority delegated by a resolution of that body, adopted on the 16th of July previous, and identified with a notarial act of even date with them.

The resolutions authorized the president of the police jury to draw on the parish treasurer warrants in favor of the municipal authorities of the town of New Iberia, for $4500, for the building of a bridge over Bayou Teche, within the limits of the corporation, payable, to the extent of $1000, out of a special appropriation on the tax of 1866, and for $3500, out of any surplus funds in the hands of the treasurer, the proceeds of the taxes of 1865, 1866, 1867 and 1868.

It was not until the 5th of October following, that an act was passed between the president of the Police Jury and the town authorities of New Iberia on the subject, and that the warrants, under the form of *promises to pay*, were drawn. By Act 208, approved October 30th, 1868, the town of New Iberia was detached from the parish of St. Martin, to form part of another parish known as the parish of Iberia. The act is silent as to the mode of payment of the indebtedness incurred and to be satisfied by the parish of St. Martin, enuring to the benefit of the detached territory. To all appearances, it was only *after* the dismemberment had been effected, that the bridge was contracted for and constructed. There is nothing to show that the work was done, but the inference is unavoidable, from the fact that the obligations were uttered by the municipal authorities of New Iberia and are now held by the relator, who has alleged and established title to them, contradictorily with the police jury of St. Martin parish, in the shape of the judgment declared upon and made the foundation of the present proceeding. Those obligations were the inducements offered and accepted for the construction of the work of public improvements.

If it be legal under the peculiar and unfortunate circumstances of this case to fasten the responsibilty for the payment of those obligations on the parish of St. Martin, it is likewise lawful and just besides, to hold their owner to a strict observance of the terms and conditions under which they were issued, which he accepted, and which have not been, in any manner, subsequently modified by the parish of St. Martin. While the relator is entitled to all the rights which the "promises to pay," under the resolution, the act and the judgment, confer,—he cannot escape the obligations which they impose or the limitations with which they have been surrounded.

The resolution of the 16th of July, 1868, being expressly referred to in the body of the obligations owned by the relator, forms part of them, the more so as it is also mentioned and reiterated in the notarial act with which they are identified.

If there exist a contract, it is that evidenced by the resolution, the act executed in furtherance of it, and the obligations uttered in conformity with it, and which were recognized as binding on the parish of St. Martin. To that contract the relator points as the foundation of the

present proceeding,—of that contract only, can he seek a specific performance. Under that contract he is entitled to be paid in a particular manner exclusive of all others, by specific appropriation and covenant.

The resolution to which the obligations refer declare that these shall be paid to the extent of $1000 out of taxes of 1866, and to the extent of $3500 out of any surplus funds in the hands of the parish treasurer as the proceeds of taxes of 1865, 1866, 1867 and 1868.

The relator seeks in this action the immediate levy of a tax on the taxable property of the parish according to the assessment roll of the current year, sufficient to realize the amount needed to pay the judgment in his favor for $4500, with interest and costs.

He is clearly not entitled to that relief.

In ruling as we do, we leave out of view not only article 209 of the Constitution in force, but also Act 56 of 1877, charged as impairing the obligation of the alleged contract, and which were both intended for public relief. We are thereby dispensed from the necessity of determining the question of impairment of such contract. We decide that, under the Constitution and laws of the State, and under the evidence, we are justified in restricting relator to the terms of the contract which he invokes, and which provides for payment of his claim, in a manner different from that which he demands. We hold the parties to their engagements and render them the justice to which they are entitled, under the exceptionally complicated circumstances of the case submitted for determination.

We think the judge *a quo* erred in his conclusions.

It is, therefore, ordered and decreed that the judgment appealed from be reversed; and proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed that there be judgment for the defendant, rejecting the demand of relator, with costs in both courts.

Messrs. Justices Levy and Fenner recuse themselves: the former having been of counsel in the case, the latter having been consulted as counsel in a similar case, and being individually interested in an analogous suit, to be determined in the same manner as the present one.

The remaining three members of the Court being unable to concur, their Honors G. W. Hudspeth, District Judge of the District Court for the Thirteenth Judicial District, and John Clegg, Judge of the District Court for the Twenty-fifth Judicial District, were called upon, under the provisions of article 85 of the Constitution, to sit in the place of the Justices recused, and have done so.

Mr. Justice Tood dissents from the opinion and decree of the Court, thus composed of their Honors E. Bermudez, Chief Justice; F. P. Poché, Associate Justice; and G. W. Hudspeth and John Clegg, District Judges.

DISSENTING OPINION.

TODD, J. On the 29th of November, 1873, the relator obtained a judgment against the parish of St. Martin for $4500, with eight per cent. interest per annum thereon from the 5th of October, 1868. No appeal was taken from this judgment. In 1875 the parish brought an action to annul this judgment, on grounds assailing its consideration, and the authority of the police jury of the parish to contract the debt on which it was rendered. This action was brought by appeal to this Court, which rejected the demand for the reason declared, "that all the defenses to the judgment there urged might have been pleaded as defenses to the suit in which the judgment was rendered."

See James S. Robichaud, President Police Jury, vs. Thomas W. Nelson et al., 28 An. 578.

The judgment against the parish in favor of relator, rendered in 1873, as stated, ordered the assessment and collection of a special tax sufficient to pay the amount thereof, the tax to be levied and collected, by the terms of the judgment, immediately after its rendition.

The relator alleging that, notwithstanding repeated demands, the Police Jury of St. Martin had refused to pay the judgment or assess any tax for its payment, applied to the District Judge of said parish for a mandamus to compel that body to assess and the tax collector to collect a sufficient tax to pay the debt. The mandamus was granted and made peremptory by the District Judge. An appeal was taken from his decision, and the case came before this Court at the last term held here (Opelousas) in 1880.

The case was heard on appeal and remanded to the lower court. The cause or reason of the remanding will be more fully understood by referring to the language of the court in the opinion rendered on the occasion, which I quote in part, the part bearing on this particular point, as follows. "The present proceeding is instituted against the Police Jury of the parish of St. Martin, and has for its object to compel them by mandamus to assess, collect and apply a special tax for the payment of the relator's judgment.

"The application is resisted on two grounds:

"1. The State and parish tax collector was not made a party.

"2. The law under which the judgment was rendered for the tax and application of the tax was repealed by Act No. 56 of 1877. As a corollary, it was argued in the pleadings that said law being essentially a remedial law its repeal did in nowise impair the relator's rights, but merely suspended or abolished one of the means by which his said vested right could be exercised or executed; it is, therefore, valid and constitutional. The judge directed the assessment of a special tax of one per cent and the police jury has appealed from it.

"First. The State and parish tax collector was served and has joined issue, and is therefore a party.

"Second. The Act of 1877 should be no bar to the exercise of the remedy accorded by law to the plaintiff, and which was in force at the time he obtained his judgment, and which, not only theoretically but practically, formed part of that judgment, *provided* that judgment be founded on a *contract.*

"The only evidence before us is the judgment itself. Neither the pleadings nor the evidence on which the judgment was rendered are in the record. The very petition in the present proceeding is silent on the subject of the obligation of the parish to pay the judgment as springing from a *contract.*" * * * * * * *

"If the judgment relied upon was not founded on a contract, we would be powerless to enforce its payment in the manner proposed, prohibited, as we would be from so doing by article 209 of the Constitution of 1879, limiting taxation to ten mills, as was held in State ex rel. Folsom vs. City of New Orleans, recently decided." * * *

"We think it our duty, in furtherance of the ends of justice, to remand the case in order that the relator may have an opportunity of establishing that his judgment is founded on a *contract,* if such be the case, and that the defendants may adduce such further evidence, and make such other defenses as the nature of the suit may require."

It is clear to my mind, from the foregoing, that the object of remanding the proceeding to the lower court was to ascertain whether the judgment in question was founded on a contract or not. If it should prove, according to the evidence, to be adduced in the lower court—to be founded on a contract, then there was a strong implication, according to my construction, of the language of the former opinion just quoted, that, a *contract* being shown, as the basis of the judgment, then the relator would be entitled to the remedy sought, and the mandamus would be made peremptory.

It in effect said to the relator: return to the lower court, prove that your judgment was upon a contract, and receive your writ to compel its payment.

It is stated in the opinion of the majority of the Court just read, that the terms of the remanding did not authorize or mean a re-opening of the case, in which the judgment had been rendered, with a view to the admission of evidence affecting the merits or consideration of the judgment. Besides, it was beyond the power of this Court to remand for any such purpose. The judgment had been rendered for seven years or more, and a demand for its nullity had been rejected. It was *res adjudicata,* a finality *conclusive* as to the fact that the parish owed the relator the debt evidenced by the judgment. Whether it was a righteous

or an unrighteous debt was beyond inquiry. The only question left open to be asked and answered was: *was the judgment founded* on a contract, *or did it grow out of a tort;* for it must have been based on one or the other.

The case was remanded, the necessary inquiry made and the evidence adduced which, upon my mind leaves not the shadow of a doubt that the judgment against the parish of St. Martin, which the relator is here before us asking to be enforced, was founded on a contract; and in my opinion, he has fulfilled the sole condition on which the exercise of his right was suspended by our previous decree, by establishing that his judgment *was* founded on a *contract.* With this showing, I think he can now rightfully claim the remedy he seeks. To refuse it, would be, virtually, in my opinion, denying him the protection to which he is entitled under the clause of the Federal Constitution forbidding the impairment of a contract; a protection which this Court recognized as bearing on this question in its former opinion referred to, and more *emphatically* in the case of the State ex rel. Martin vs. Police Jury of Caddo, 32 An. 1028, when it declared, referring to the obligations of another parish, that "the contract in existence between the bondholders and the parish of Caddo is protected from impairment by the Federal Constitution, and must be enforced." This was the language of an unanimous Court, as was that quoted above from our former opinion in this case.

The judgment was rendered upon notes executed by the President of the police jury of St. Martin, and those notes given for the building of a bridge.

I see no reason for extending inquiry beyond those simple facts, as they, alone, have a bearing on this question of a contract. And in view of this single and simple issue, in the present state of the proceeding before us, I cannot readily appreciate the bearing and pertinency of the questions discussed in the majority opinion about the injustice of the debt or the hardship of its payment by the debtor, particularly since it is admitted in that opinion that the judgment is *res adjudicata.* Nor do I find any thing in the course pursued by the relator's counsel in the introduction of his evidence on the last trial in the lower court upon the question of contract or no contract, that opened the way to a broader investigation, and rendered the matter mentioned a legitimate subject of discussion in this case. All that he did in this connection strictly pertained to proving his contract.

It is highly probable, that if the considerations, now so ingeniously and ably urged touching this debt, had been used as defenses against the demand before judgment, the judgment would never have had an existence. This Court in the decision referred to in the suit of nullity cited (28 An. 578), declared that similar considerations, or others quite

as formidable, though urged in a proper action, and at a more seasonable time, could not be listened to. I am equally of that opinion now.

Nor can I see any thing in the failure or refusal of the judgment debtor—the parish of St. Martin—to obey the mandate of the Court embraced in the judgment, and levy the tax ordered to pay the debt at the time ordered, can now be held as giving the parish an immunity from the debt, and enabling it to so profit by the default, as virtually to destroy the remedy of the creditor, and leave him with a barren judgment, stripped of all means of enforcing it. Such I construe to be the effect of the decree just rendered, that it restricts him expressly to the tax ordered in 1873 by the judgment, when rendered, as the sole resource for getting his money, when it must be apparent that no such fund was ever raised, and had it existed, would long since have disappeared.

For these reasons, hastily prepared in the limited time allowed me, I dissent.

No. 1127.

C. C. DUSON, CURATOR, ET AL., VS. LASTIE DUPRÉ ET AL.

The sale of Plaintiffs' interest in the land sued for in a petitory action, for a fixed price and without warranty, is the sale of litigious rights, and the vendee being the sheriff of the court in which the suit is pending, such sale is null and void. The fact that the suit is still carried on, after the transaction, in the name of the original Plaintiffs, does not prevent the nullity.

APPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Ogden*, judge *ad hoc*.

John E. King for Plaintiffs and Appellees:

First—What the law means by the sale or transfer of a litigious right, is a sale with a fixed price, where there is no guarantee of the claim, and where the sale is at the purchaser's risk. Unless these requirements concur there can be no sale of a litigious right. Pothier, Vente, 583, p. 335.

Second—A sale by the heirs of their claim to a tract of land which is in litigation, for a price payable only when the litigation shall have terminated, and when the claim shall have been confirmed and validated by a judgment, is not a sale of a litigious right. C. C. 2457, 2043, 2044.

Third—Such a sale is made with a suspensive condition, to take effect only on the happening of the stipulated event, and the claim thus purchased is not at the risk of the purchaser, while it is guaranteed to him. C. C. 2044.

Fourth—Such a sale conveys to the purchaser neither property nor ownership in the claim purchased, the title to which remains in the seller until the event has happened which validates the claim. C. C. 2471; 6 R. 172.

Fifth—Such a sale is not a present and executed sale, but is rather a promise to sell at a future time, when the claim shall be out of litigation, and legalized by a judgment. C. C. 2462; 13 An. 361; 17 L. 448; 10 An. 160.

Sixth—Such a sale is a sale or promise to sell a judgment, or a valid title, neither of which is a litigious right. 6 R. 172; 2 An. 60.

Seventh—The party against whom a litigious right has been sold, may get himself released by paying to the transferee the price and interest; but to avail himself of this provision, he must pay or tender the price as soon as he is made acquainted with the transfer. C. C. 2652; 3 An. 626.

Eighth—If the defendant, who seeks to get himself released by paying the price, continues to contest the suit, raises difficulties as to the right of the plaintiff to recover his debt, and protracts the litigation, he defeats the very object of the law, and cannot avail himself of the provisions which the law has established in his favor for the purpose of terminating litigation. To permit him to do it, would be to defeat the very object of the law. Pothier, Vente, 597, p. 343; 2 Troplong, Vente, 999, p. 567; 6 Marcadé, p. 355; 4 An. 105; 22 An. 342; 24 An. 249.

Ninth—The sale of a litigious claim to an attorney under C. C. 2447 does not extinguish the claim itself. The nullity of the sale does not involve the destruction of the thing sold. The nullity is relative and may be avoided by the debtor; but what is avoided is the sale of the litigious right, not the right itself, which may still be enforced by the vendor, though the nullity have been decreed in proceedings by the vendee against the debtor. N. O. Gas Light Co. vs. Webb, 7 An. 168; Troplong, Vente, No. 196; Duranton, lib. 3, title 6, No. 145.

Tenth—The heirs of a vacant succession, who have not presented themselves for recognition to the Probate Judge, cannot interfere with the functions of the curator. Until they present themselves according to law, the curator is bound to take all necessary steps for the proper settlement of the succession. 2 An. 538.

Lewis & Bro. for Defendants and Appellants.

The opinion of the Court was delivered by

Poché, J. C. C. Duson, as curator of the succession of Louis Blanc, and F. F. Perrodin, as attorney of absent heirs, seek by the petitory action to recover a valuable tract of land situated in this parish, which they allege to be the lawful property of said succession and in the illegal possession of defendants. Among other defences, the defendants urge by way of peremptory exception that plaintiffs cannot maintain this action, on the ground that since the institution of this suit, which was filed on the 24th of October, 1879, C. C. Duson purchased on the 5th of January, 1880, from the heirs of Louis Blanc, all their rights, titles and interest in and to the land in controversy; that, therefore, Duson, personally, is the real party plaintiff in interest; but that, being at the time of his alleged purchase the sheriff of the parish of St. Landry, his acquisition of the interest of such heirs, being the purchase of a litigious right, was null and void under the provisions of Art. 2447 C. C. Plaintiffs have appealed from the judgment of the lower court, maintaining this exception and dismissing this suit.

The record shows that, by authentic act passed on January 5th, 1880, Jules A. Blanc and nine other persons, claiming to be the legal heirs of Louis Blanc, sold *without warranty* to C. C. Duson, "all their and each of their right, title, estate, claim and demand, if any they

have, both at law and equity, and as well in possession, as in expectancy in and to" the tract of land which is the subject-matter of this litigation, and which had been acquired by their ancestor Louis Blanc from the succession of Antoine Blanc.

The terms and conditions of the sale are contained in the following words:

"Thus done for and in consideration of the price and sum of twelve hundred dollars, which said Duson agrees to pay to said heirs or to each of them, in proportion to his or her several interest, *in the event of the successful recovery of said land, and immediately upon the happening of such event*," &c.

Plaintiffs argue in the first place that this contract does not fall within the scope of the prohibition contained in Art. 2447 C. C., which reads as follows:

"Public officers connected with the courts of justice, such as judges, advocates, attorneys, clerks and *sheriffs*, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages and interest," because the contract does not contain the elements of a sale of litigious rights, in this that the sale depended upon a suspensive condition, which was a future and uncertain event, and because the purchaser took no risk under the uncertainty of the future event, having no purchase price to pay in the event of the failure to recover the lands for the succession of Louis Blanc, and they confidently rely upon the following principle enunciated by Pothier in support of their conclusion:

"Lorsqu'une créance de cette nature est vendue à quelqu'un pour un certain prix, pour que l'acheteur la fasse valoir à ses risques et à ses frais, et sans qu'on la lui guarantisse, c'est ce qu'on appelle une vente *de droits litigieux*, ou de *créances litigieuses*."

We accept this as a correct definition of the sale of a litigious right, which is also defined in our Code, Art. 3556, paragraph 18, as a right which cannot be exercised without undergoing a lawsuit, or a right about which there exists a suit or a contestation. C. C. Art. 2653.

We shall now examine the elements of the sale, as indicative of the intention of the parties, so as to ascertain whether the purchaser was to pursue the rights which he acquired at his risk, and whether such rights were transferred without warranty from the vendors. A careful examination of the act shows that it is exactly what it purports to be: a *sale* by the heirs of Louis Blanc to C. C. Duson of all their rights and titles to the lands which are in suit, and in which suit, as the record shows, there was a contestation, and in which issue had been joined by the defendants.

It also appears from the act that, in addition to and immediately following the recital of the terms and conditions of the sale hereinabove quoted, the following stipulations were contained in the deed or transfer: "And *should the said Duson* recover less than the whole of said land, then he shall be bound to pay such proportion of said price as the value of the part recovered shall bear to the value of the whole." "Thus done *without any warranty* or guarantee of title whatever on the part of said heirs." We, therefore, hold that this contract contains the three essential requisites laid down by Pothier as the characteristics of a sale of a litigious right: First, it was made for a fixed and stipulated price, the sum of twelve hundred dollars; second, the purchaser was to pursue his acquired rights, or recover the lands purchased, at his own risk and expense, or, in other words, the purchaser, the sheriff of the court in which the suit was pending, was to become a litigant in the court of which he was the executive officer, for the recovery of valuable rights which he had purchased *pendente lite;* and third, his vendors were expressly released and exonerated from the usual warranty of vendors, touching the validity of the rights which they purported to transfer to their vendee; the purchaser was without recourse on his vendors, even if on trial their capacity as heirs had been denied and disproved. The conclusion is, therefore, irresistible, that the rights which Duson acquired in this transaction were litigious rights, involved in a suit pending before the court of which he was the sheriff, and that his contract falls under the prohibition enunciated in Art. 244 of our Code, and is, therefore, a nullity. 9 M. 184; 4 An. 174; 7 An. 164; 25 An. 557.

Plaintiffs' counsel, in his brief, admits in so many words that, from the act the intention of the parties was manifest, that Duson was "*to prosecute this suit to final judgment,*" the very act which the provisions of the Code contemplated to prohibit.

But plaintiffs contend, in the second place, that the declaration of the nullity of the sale of the litigious right does not destroy the right itself, or affect its validity, and that this suit being in the name of the succession of Louis Blanc, and not in the name of Duson personally, should be maintained by the Court, and tried on the issue involving alone the lawful title to the lands in controversy; which issue, as to the defendants, is the same, whether presented by the succession or by the vendee of the rights of the heirs.

By his own act Duson has manifested the unequivocal intention to prosecute this suit, not for the benefit of the succession which he represents, but for his own personal advantage, in the vindication of the rights which he honestly believed to have acquired from the heirs of Louis Blanc.

His purchase having been declared a nullity, the effect of such a declaration is to re-invest those rights to the heirs, who have doubtless the power and authority in law, under proper proceedings, and with proper showing of their intention to act on the faith of the nullity thus declared in their favor, to enforce their rights and their titles to the lands in controversy. But until they have thus spoken and thus acted, courts cannot and will not anticipate the future, and must deal with the parties as they actually stand before them. By maintaining this suit, under the circumstances disclosed by the record, showing the unmistakable attitude of an officer of the District Court, seeking to enforce a litigious right acquired by him in direct contravention of a prohibitory law, this Court would itself violate a law enacted in furtherance of a wise public policy, and for the greater purity of the administration of justice. With the District Judge, we feel it our duty to exonerate this particular officer from the slightest imputation of moral turpitude, and to recognize in this transaction an honest error of judgment on his part; but it is nevertheless our duty to apply the nullity so clearly denounced by the law.

Understanding the judgment of the lower court as maintaining defendants' exception and dismissing plaintiffs' suit, without prejudice to the rights of the succession of Louis Blanc, or of his heirs, to vindicate their alleged titles to these lands by proper proceedings, we find no error in the decree rendered by the judge *a quo*.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be affirmed at appellants' costs.

No. 1115.

SUCCESSION OF AUGUSTE PICARD.

Act No. 106 of the Legislature of 1880, giving power to the Clerks of the District Courts, throughout the State, the Parish of Orleans excepted, to appoint administrators of successions, does not dispense them with the necessity of rendering an order in making the appointment; and, until such an order is rendered, the appointment is invalid and a party with a better right to such appointment, is in time to present his application.

APPEAL from the Twenty-fifth Judicial District Court, parish of Lafayette. *Mouton*, J.

M. F. Rigues for Plaintiff and Appellee:

The beneficiary heir, present or represented, has preference over every other person, not excepting the surviving husband or wife. R. C. C. 1042-1121; Suc. of Briscoe, 2 An. 268; Suc. of Williamson, 3 An. 261; Suc. of Brinkham, 5 An. 27. Curatorship of an estate can only be granted by an order of court. 6 An. 700; 3 An. 587; 26 An. 330.

When appointed their powers cease when heirs present themselves and demand the administration. 4 L. 571; 4 An. 25; R. C. C. 1192.

Preference may be claimed as long as the appointment has not been confirmed on an earlier applicant, though the opposition has not been made in the ten days. Suc. of McKinney, 4 An. 25; Suc. of Block, 6 An. 810.

Deputy Clerks cannot exercise judicial functions. Constitution, Art. 122, Act 1880, No. 106, Secs. 2, 7.

Though the surviving spouse be a creditor or usufructuary of an estate, the beneficiary heir may still claim the preference in the administration. R. C. C. 1121; Suc. of Brinkham, 5 An. 27.

M. E. Girard for Defendant and Appellant:

An enabling order from a clerk is not necessary to authorize him to perform duties he is authorized by law to perform.

The opinion of the Court was delivered by

POCHÉ, J. At the death of Auguste Picard his widow applied for the administration of his succession, and after public notice and legal delays, she took the oath and furnished her bond as administratrix, September, 1880.

In December following, Aristide Picard, alleging that he was a son of the deceased by a previous marriage, and as a beneficiary heir of age and present, entitled to preference in the appointment of an administrator on his father's estate, filed a petition opposing the right of the widow to the administration of said succession, on the ground that she had attempted to qualify as administratrix without an order of appointment, and that she had no letters of administration, concluding with a prayer for recognition of his superior rights, and for the appointment to the administration of the succession.

His opposition was sustained by the lower court, from whose judgment widow Picard has appealed. The record shows that, on September 27th, 1880, appellant subscribed an oath and furnished a bond, as administratrix of the succession of Auguste Picard, but it contains no order, either of the judge or of the clerk, appointing her as such. It is, in fact, conceded by her counsel that no such an order was ever granted, and he contends that under the provisions of Act 106, 1880, relative to the duties and powers of clerks of court, in all parishes other than the parish of Orleans, passed in furtherance of Art. 122 of the Constitution, no such order is necessary. He contends that the power to appoint administrators being specially conferred to clerks, it would be an idle and useless ceremony for the clerk to issue an order to himself, directing the performance of a certain duty.

Previous to the adoption of that act, the power to appoint administrators was vested exclusively on the judge of the court, without whose order or decree the clerk was absolutely powerless to consider or act on the application of any one for appointment as administrator, and it,

therefore, follows that without such an order, the act of the clerk in administering the oath of administrator to an applicant, and accepting his bond as such, would have been an absolute nullity.

The legislation authorized by Art. 122 of the Constitution and incorporated in Act 106 of 1880, did not have for its object, and cannot be attributed the effect of dispensing from the order appointing the administrator. Its only object was to invest the clerk with the power of making such appointment, a power which had been specially denied him by the Constitution of 1868, and a power which was required for a proper and a speedy administration of justice under the new Constitution of 1879, which had abolished the system of parish courts, under which every parish had constantly present a probate judge, entrusted with the exclusive power to issue all orders and render all decrees necessary in the settlement of successions. The order appointing an administrator, is not an order from the clerk ordering himself to qualify the administrator, but it is a judicial function specially authorized by the act of the Legislature, and is the indispensable mandate of the court, under which alone the administrator is authorized to qualify and to represent the succession thus entrusted to him, and by virtue of which he becomes the officer of the court in the management of the succession.

To him it is his commission, as the commission of the Governor is the muniment of State and other officers' titles to their offices. By the same act the clerk is authorized in certain cases to grant writs of injunction; we can hardly conceive that it could be contended that, in the absence of an order granting the writ of injunction, the mere accepting by the clerk of the injunction bond would or could operate a legal stay of the execution or other proceeding sought to be enjoined.

We, therefore, conclude that appellant in this case has not yet been appointed according to law, as the administratrix of her husband's succession, and that appellee's opposition to her application is in time, notwithstanding the expiration of the ten days' public notice. Succession of Block, 6 An. 810; Succession of McKinney, 4 An. 25; Hook vs. Richardson, 4 L. 571.

The question is thus narrowed down to the contest for the administration between the beneficiary heir of age, and the surviving wife without issue from the marriage. That the heir must be preferred is clearly settled by Art. 1121 of our Code, and, therefore, the judgment of the lower court is correct.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be affirmed with costs.

No. 1125.

THOMAS B. HOPKINS VS. THE LOUISIANA WESTERN RAIL ROAD COMPANY.

ON THE MOTION TO DISMISS.

The submission of the controversy in this case to arbitrators, was made with the understanding that they should have power to act as amicable compounders. Under the law (Art. 460, C. P.), the judgment of the Court rendered upon the award, cannot revise it. It follows that the judgment itself is not appealable.

APPEAL from the Twenty-fifth Judicial District Court, parish of Lafayette. *Clegg*, J.

M. E. Girard and *E. Simon* for Plaintiff and Appellee.

Arbitrators constitute an exceptional tribunal created by the parties, to whom the law permits the parties to delegate a *final* and *unappealable* jurisdiction (when there is no fraud or misconduct) under the name of amicable compounders. 14 An. 323.

In a submission to arbitrators, all questions put at issue by the pleadings fall within the powers of the arbitrators to decide. 31 An. 97, Jackson vs. Hoffmann.

In an award of amicable compounders, the Court cannot correct what may appear to it *errors*, for they might have been caused by yielding to the dictates of equity. 13 An. 37.

The award of amicable compounders within the scope of their authority is conclusive as to the parties who agreed to submit, and *is not reviewable by the courts*. 31 An. 336 and 4 An. 148; 7 An. 171.

Breaux & Hall for Defendant and Appellant.

Suit of Hopkins vs. La. Western Railroad Co., No. 3215, not submitted to arbitration. There must be no doubt as to the submission. C. C. 3104.

An invalid award cannot be the basis of a judgment. Hennen's Dig., Arbitration II, No, 29.

ON THE MOTION TO DISMISS.

The opinion of the Court was delivered by

LEVY, J. Appellee moves to dismiss this appeal on the ground that this Court dismissed an appeal on the consolidated cases of 3214, the expropriation case, and 3215, the present injunction and damage case, for want of jurisdiction *ratione materiæ*, and, therefore, the question of jurisdiction having been thus decided, it is final and constitutes *res adjudicata*. In the decision relied upon by appellee, we said: "As to Hopkins, he was plaintiff in the injunction suit and defendant in the other; the causes of action were different and distinct in the two suits, and it is untenable to argue that the two amounts involved in the two cases can be cumulated for the purpose of determining our jurisdiction of this appeal." Thus we practically held that the cumulation for purposes of appeal, or to give jurisdiction to our Court on appeal, was improper and, therefore, the present case was not considered as being then before us for review. The year within which a devolutive appeal could be taken, not having expired, the appeal, if the case involved sufficient amount and was otherwise appealable, has been taken in due time.

Appellee, however, presents this further ground in support of his motion: That the judgment of the District Court is based on an award of compounders, which is not subject to our revision. Art. 460 Code of Practice contains the following provision: "But if from the submission entered into by the parties, it appears that they intended to give the arbitrators power to act as amicable compounders, the Court cannot revise the award. It must be homologated as it stands, in order that it may have the effect of a definitive judgment." "There are two sorts of arbitration: the arbitrators properly so called, and the amicable compounders." C. C. 3109.

The appellant contends that the submission under which the award was made herein, was not to amicable compounders, but to mere arbitrators, and that the value of the land sought to be expropriated, the damages thereto and the matter in contest relative to the value of the land and damages thereto, are the subjects submitted for arbitration, and denies that the damages claimed in the injunction suit were also submitted for determination and award.

The record discloses, as appears in the order granting the first appeal, that cases 3214 and 3215 had been consolidated. The submission to arbitration, signed by the La. Western Railroad Co., by their attorneys, by M. E. Girard and E. Simon, attorneys representing the parties of the second part, and by Thomas B. Hopkins (who is not only plaintiff in 3215, the injunction suit, but also one of the defendants in 3214, the expropriation suit), sets forth as follows: "It is hereby agreed by and between the La. Western Railroad Company of the first part, and the Oliver Boudreaux heirs, and the H. E. Laurence heirs and Zephirin Boudreaux in his individual right and T. B. Hopkins, all of whom are named in a petition filed in the suits *3214 and 3215*," &c. * * * "That each of the parties of the first and second parts shall name an *arbitrator and compounder* to appraise the value of the property described in said petition, and damages and all matters in contest." The oath taken was, "to faithfully perform the functions incumbent upon me as arbitrator and compounder," &c. The award is headed and reads as follows: "La. W. Railroad Co. vs. Thos. B. Hopkins and als., No. 3214, expropriation suit, and T. B. Hopkins vs. La. W. R. R. Co., No. 3215, injunction suit. In the above entitled causes the undersigned arbitrators and compounders, beg leave to report that they have executed their mandate and report their award as follows:" &c. The award was homolcgated by judgment rendered in the two cases, 3214 and 3215, consolidated.

The terms of the submission itself, the action in connection therewith by the Court and the arbitrators and compounders thereunder lead us irresistibly to the conclusion that the submission, the arbitration and

the award were to and by amicable compounders, and that, under the law on the subject, the award has the effect of a definitive judgment not subject to our revision.

The ruling of the Court in Davis vs. Leeds, 7 L. 476, is applicable to and covers this case: "The submission, in the present case, clearly contains a grant of power to the arbitrators, to act as amicable compounders, and consequently deprives the tribunals of the country of all authority to revise the award rendered in pursuance of it. Whatever has been done, in relation to matters actually referred to their decision, if done honestly, must remain without the possibility of revision, and as a necessary consequence, without alteration or amendment." "If parties will submit their disputes to be decided by men chosen by themselves as judges, under the appellation of amicable compounders, they must abide their judgments, without hopes of having them revised by the courts of justice established by the Constitution and laws of the State. Such judges are not required to determine according to the strictness of the law. They are authorized to abate something of this strictness in favor of natural equity." *Id.* 4 An. 148; 1 An. 171; 1 R. 102; 28 An. 500.

For the reasons stated, we are without authority to revise the judgment, and this appeal is, therefore, dismissed at costs of appellant.

Justice Todd having been recused in No. 3214, referred to, takes no part in this decision.

No. 1109.

MARY ANN PETIT, WIFE, &c., VS. STEVENS & SEYMOUR ET AL.

This is a suit for damages, by a wife separated in property, against creditors of the husband, for having seized and sold goods which, she pretends, belonged to her and were in her possession. *Held* that the evidence shows conclusively that the goods belonged to the husband.

APPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

H. L. Garland for Plaintiff and Appellant:

First—A wife separate in property from her husband is a third person. Her possession is as complete and as distinct from that of her husband as the possession of any other person.

Second—Her possession has the same legal effect as against her husband, or as against his creditors, as that of any other person.

Third—Possession, with or without good faith, of movables is title by legal presumption.

Fourth—Legal presumption is proof, and must be rebutted, where the law allows rebuttal.

Fifth—It is incumbent, then, on a seizing creditor of movables, who finds them in possession of a third person, to make clear that they do belong to his debtor. It is not sufficient to prove that they do not belong to the possessor.

Kenneth Baillio for Defendants and Appellees:

The ownership of things or property is acquired by inheritance either legal or testamentary, by the effect of obligations and by the operation of law. C. C. 870.

A contract of sale can take place between husband and wife only in the three special cases provided by law. C. C. 2446.

Counter-letters can have no effect against creditors or bona fide purchases; they are valid as to all others. C. C. 2337.

Possession is prima facie proof of ownership, and an adverse claimant must rebut this presumption by positive proof. C. C. 3434, 3454.

The plaintiff must make his case clear. 11 M. 194; 3 N. S. 575; 6 N. S. 207; 12 R. 40, 95, 883.

The burden of proof is on him who has to support his case by a fact of which he is supposed to be most cognizant, and the evidence of which is more within his power than that of his opponent. 11 M. 4, 194; 3 L. 534; 10 A. 639; 13 A. 397.

Conversations and admissions of one of the parties to a simulation are admissible in evidence, though made out of the presence of the other party. 29 A. 4.

The opinion of the Court was delivered by

FENNER, J. The plaintiff, wife of Abraham Milspaugh, and separate in property, alleges that she was the owner of a stock of goods contained in a certain store in the town of Washington, in this parish, which was seized and sold by defendants under a judgment against her husband; and for said wrongful seizure and sale, she claims damages to the amount of five thousand dollars.

After an attentive study of this huge record, we find that the pretensions of plaintiff are entirely unsupported by the evidence.

The contention, ably urged by her counsel, is that plaintiff was, at the time of seizure, in actual possession of the movables seized; that such possession vested her with presumptive title; and that, in order to succeed in their defense, it is necessary for the defendants to establish, not merely that the goods seized did not belong to the plaintiff, but that they did belong to their judgment debtor.

Assuming plaintiff's possession to have been established, the proposition, as above stated, would perhaps be correct, if the seizure of the goods were pending, and plaintiff were prosecuting a suit, by injunction, to restrain the sale and release the seizure. But, here, plaintiff obtained no injunction; the sale has been made; the funds paid over; and the execution is completed. Nothing remains but a suit for damages, based exclusively on the allegation that defendants have wrongfully seized, sold and appropriated to their use property which belonged to her. If it is proved that the property did not belong to her, the foundation of her action is removed; since, even if the property belonged to some person other than either herself or the judgment debtor of defendants, that person, and not the plaintiff, is the person damaged and entitled to indemnification.

The evidence, however, conclusively satisfies us:

1st. That plaintiff did not have possession of the goods seized;

2d. That she was not the owner thereof;

3d. That Abraham Milspaugh was both owner and possessor.

Prior to 1873, Abraham Milspaugh had, for many years, owned and conducted this store. At that time he had become heavily involved. One of his judgment creditors then seized and sold the stock of the store. It was bought in the name of his son, James H. Milspaugh. The seizing creditor's debt was settled by notes of James H., endorsed by a responsible friend of the family. It is not pretended that James H. bought for himself, or that he expected to pay the notes. He bought for his father, under the expectation that his father should continue the business and pay the notes, and his father did pay the notes. The pretension that the plaintiff, and not the father, was the real purchaser in the name of the son, is not sustained by the proof, and, if it were, would not sustain plaintiff's claim, because, at that time and for many years thereafter, plaintiff was not separated in property, and her purchase would not have operated differently from that by her husband.

If she was the real purchaser in the name of James H., the purchase enured to the benefit of the community. If she was not, how did she ever acquire title? The nominal title remained in James H. until his death in 1879; and the real title was either in him or in the community subsisting between Mr. and Mrs. Milspaugh. He never transferred title to her after her separation; and the community or her husband could not have done so, because her separation suit established no separate rights against her husband.

It is clear that James H. Milspaugh's purchase and title were mere shams, intended to protect the real ownership of A. Milspaugh from the assault of his creditors. James H. never denied, but always admitted, that the store was really his father's. After the death of James H. in 1879, it became necessary to interpose another disguise; and a sham sale was made to R. B. Hewitt, a son-in-law. Though contradictory, the weight of the evidence is in favor of the proposition that this sale was made by A. Milspaugh. A counter-letter, however, was taken in favor of the plaintiff, evidently to establish a further refuge, in case Hewitt should die or leave. He did leave for parts unknown not long before the seizure by defendants; and, as a last resort, the wife opposes her own claim of title against these creditors. It has no origin in any of the modes of acquiring property recognized by law. It is supported by no evidence except occasional and suspicious assertions of ownership by the wife and acknowledgments thereof by the husband, totally inconsistent with the acts and conduct of both, and evidently designed to throw further clouds upon the true title of the husband. As to possession, every unsuspicious circumstance locates it in the husband. He

rented the store. He transacted the business. The taxes and licenses were assessed in his name, when not in the name of Jas. H. Milspaugh. The presence of the wife in the store, and her occasional interventions in the business, are accounted for by the relation of husband and wife, and by the fact that the store and the matrimonial domicile were in the same building.

We have rarely encountered a case of conflicting evidence, where the preponderance was more overwhelmingly in favor of one side of a case, and that is, here, the side of the defendants.

It would be a useless waste of time to discuss the particulars of the testimony further.

It is, therefore, ordered that the judgment appealed from be affirmed at appellant's cost.

No. 1122.

SUCCESSION OF SARAH E. HAYES. ON OPPOSITION OF O. HAYES ET AL.

The husband in this case, having by his wife's last will the usufruct of her share of the Community, and, whilst acting as her Executor, having sold for Confederate money cotton belonging to the Community, is held to have sold it as usufructuary and not as Executor, and to be liable for its value.

APPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

Lewis & Bro. for Opponents and Appellants:

The usufruct of *cotton* is an imperfect or *quasi* usufruct, and transfers the ownership to the usufructuary. The latter may "consume, sell or dispose of it, as he thinks proper," subject only to the charge of returning the same quantity, quality and value to the owner, or its estimated price, at the termination of the usufruct.

One having the usufruct of the estate of another, by last will and testament, who exercises his usufructuary right by selling or disposing of the property "as he thinks proper;" who, in his petitions and final account, claims the rights and privileges of an usufructuary, cannot afterwards plead that he is responsible to the heirs as administrator; claiming and exercising the rights of an usufructuary, he must also be charged with the burdens incidental to the right.

John E. King for the Executor, Appellee:

'Under the exceptional circumstances in which fiduciaries were placed by the existence of war, when localities were possessed and ravaged in turn by contending armies, and when under these difficult circumstances they acted with discretion and honesty, they cannot be held responsible in law for losses which were inevitable as a result of the war." 31 An. 169.

C. C. 567. It is the duty of the usufructuary to keep the things of which he has the usufruct, and to take the same care of them as a prudent owner does of what belongs to him..

"He is accordingly answerable for such losses as proceed from his fraud, default or neglect."

H. L. Garland on the same side.

The opinion of the Court was delivered by

Poché, J. At her death, on the 19th of October, 1862, Sarah E. Hayes, wife of Jesse B. Clark, who left no issue, but several legal heirs, left a will, under which she gave to her husband the usufruct of her share in the community property.

This litigation grows out of oppositions filed by the heirs to a final account and settlement of the community, filed by Clark in January, 1866, as dative testamentary executor. Although numerous items of the account were opposed, the issue on this appeal is confined to the correctness of the judgment of the lower court in dismissing oppositions to the following items:

1st. A credit of $1055 55 claimed by the executor for cotton belonging to the succession, sold by him for Confederate notes, which were converted into Confederate bonds, now valueless.

2d. A credit of $2000, claimed by him on account of his separate property and funds brought into the community, which, opponents contend, should be reduced by $254.

1st. The proper disposition of the opposition to the item of credit of $1055 55 requires an inquiry into the nature of Clark's possession of the succession cotton sold by him for Confederate money. If he held the cotton, as he contends, as testamentary executor, then under the great danger to which the cotton was exposed, either to confiscation or to destruction by fire, during the late civil war, during which the locality where the cotton was situated, was surrounded and overrun by contending forces, or by organized bands of robbers, the disposition which Clark made of the cotton is justifiable in law, which exonerates him from responsibility in the premises.

If, on the other hand, he held the cotton as testamentary usufructuary, as opponents contend, his possession was under the imperfect usufruct, transferring to him the ownership of the cotton, with full power to dispose of it as he thought proper, entailing the obligation of returning the same, or the estimated value thereof, to the heirs, at the expiration of the usufruct. C. C. Art. 536–549.

Considering that, in his petition for the probate of his wife's will, Clark specially alleged that the usufruct of the wife's community property was bequeathed to him, and that the probating of the will was predicated upon and made with special reference to his petition; considering that, in his tableau of distribution, he claimed credit for two items charged on the inventory, on the ground that these items were for portions of crops ungathered in October, 1862, when the usufruct began, and which he claimed as usufructuary, and that the accountant must be bound by his judicial admissions, we conclude that he took and held the twenty-two bales of cotton which he sold for Confederate money, in his

right of usufructuary under the will, and that his responsibility must be tested under the provisions of our Code regulating the right of usufruct. This conclusion is further justified and absolutely confirmed by the fact, shown in the record, that the investment by Clark of the funds realized from his sale of the cotton, was not made in the name of the succession, but in his own name, and confusedly with other funds of his. We are clear that his administration, as executed, has been confined by law and by his own acts to the separate property of his wife, as shown by the inventory, and not subject to his usufruct. All these circumstances clearly differentiate this case from that of the succession of Frazier, 33 An.

Had he kept, as some of his neighbors did, his cotton to the end of the war, and sold it at forty-five cents a pound, in legal currency, and realized from the transaction some five thousand dollars in such currency, he could not have been held accountable for more than the estimated value of the cotton, as shown by the inventory. In that case, he would have been entitled to the profits, in this, he must sustain the losses.

We are clear that the usufruct of cotton, the use of which would be of no value to the usufructuary, if he did not change the substance of it, by manufacturing or selling it, is of the imperfect kind, C. C. Art. 534, and that Clark exercised his legal right in selling it, and has thus contracted the obligation of returning the same or the value thereof. Hence, in our opinion, the District Judge erred in refusing to amend the account in this particular.

2d. We are satisfied by the evidence that, among the property brought into the community by Clark, were some horses and cows, which he himself values at $254, for which animals he is not entitled to credit against the community. We, therefore, hold that the value of these animals must be deducted from the credit of $2000, allowed him by the District Judge, on account of his separate property and funds.

Appellants call our attention to the insufficiency in amount of the bond of the usufructuary, as fixed by the lower court. It must be increased from one thousand dollars to two thousand five hundred dollars.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be amended by striking out the credit of $1055 55, allowed for the cotton sold by accountant for Confederate money, by reducing from $2000 to $1746 the credit allowed to accountant, on account of his separate property or funds, by increasing the usufructuary's bond from one thousand dollars to two thousand five hundred dollars; and that, as thus amended, said judgment be affirmed; costs of appeal to be paid by appellee.

No. 1119.

THE STATE OF LOUISIANA VS. GEORGE MOULTRIE.

Under the circumstances of this case, justice required that a continuance and reasonable time to procure the attendance of his witnesses, should be granted the accused. The refusal of the same by the Court *a qua*, entitles him to a new trial.

An indictment charging larceny in one count, and receiving stolen goods in another, is valid; but, under a single count charging larceny, a conviction of receiving stolen goods, cannot be maintained.

APPEAL from the Twenty-fifth Judicial District Court, parish of Vermilion. *Clegg*, J.

Joseph A. Chargois, District Attorney, for the State, Appellee.

F. R. King for Defendant and Appellant:

First—The affidavit of an accused for a continuance cannot be contradicted; it must be taken as true. 30 A. 296.

Second—On an indictment for petty larceny, a verdict for having received stolen goods knowing them to be such, is not responsive, and must be set aside, and the case remanded.

Third—Where counsel is assigned by the Court to defend an accused person, a sufficient time should be allowed in which to prepare for the defense, especially where special cause is shown for a longer delay.

The opinion of the Court was delivered by

LEVY, J. An information was filed against the defendant, charging him with larceny, on which he was tried by a jury and convicted of the offense of receiving stolen goods, knowing them to be stolen. He was sentenced to imprisonment in the State Penitentiary, at hard labor, for six months, and from the judgment thus sentencing him he has appealed.

The information was filed on the 16th of June, 1881; the warrant for arrest was issued on the same day, and on the 22d of June, returned as executed and filed. On the 23d of June the accused was arraigned and pleaded not guilty, and the case was fixed for trial on the next day, the 24th. On arraignment accused was asked by the court if he desired counsel to be appointed to defend him, and he replied that he would himself employ counsel. On the day of the trial (the next day), prisoner being without counsel, the court assigned an attorney to defend him. Immediately after such assignment of counsel, the accused moved the court for a continuance; this motion was supported by an affidavit setting forth that he had not had an opportunity to procure the attendance of witnesses necessary for his defense; "that two of his witnesses (named) reside at a distance exceeding forty miles from the court house, and defendant having been arraigned on the 23d, and the cause assigned for trial on the succeeding day, it was impossible to cite said witnesses in time to secure their presence on the day so fixed for trial." The affidavit set forth the materiality of the testimony of the witnesses and

what he expected to prove by them; that the application was not made for delay and that the affiant expected to procure the attendance of said witnesses at the next term of the court. The continuance was denied and the trial ordered to be immediately proceeded with, for the reasons given by the judge *a quo*, viz: "That on the day of his arraignment the accused was told by the court that he must give the names of his witnesses, whose presence he might desire, to the sheriff or clerk of court, and process would issue to enforce their attendance, which he declined to do; at the time of his arraignment accused declined the assistance of counsel offered him by the court and declared his ability to procure legal assistance and refused that tendered him by the court; that it appeared to the court, from the facts and circumstances before it, that due diligence had not been used by the accused and that he desired and intended from the moment of his arrest to avoid a trial at the present term;" that "it was further proven by the sheriff, that if process had been put in his hands on the day the cause was fixed for trial, he (the sheriff) could have enforced the attendance, if he could be found at his usual domicil, of the witness Alfred Moultrie, about the hour of two o'clock on the day of trial." To this ruling of the court, defendant filed a bill of exceptions.

The accused also filed a motion in arrest of judgment, on the ground that "the verdict of the jury is not responsive to the charge as set forth in the bill of information in the case;" which motion was overruled, the court holding, that "the crime of larceny included that of receiving stolen goods, knowing them to be stolen, and that it was competent for the jury under a charge of larceny to find the accused guilty of the latter offence."

While the best interests of well ordered government and the safety of society are promoted by and require the prompt and speedy execution of justice and prosecution of offenders against the criminal laws, at the same time, justice and the rights of citizens require that all persons charged with the violation of law shall have the benefit of the advice and assistance of counsel, the machinery of the courts and *reasonable* time within which they may procure the attendance of witnesses and prepare themselves for their defence.

We do not think, that, in this case, sufficient time for these purposes was granted, and if the precedent were established, we much fear that it would operate harshly and unjustly and, instead of serving as a protection to society and means of punishing crime, might operate to cause injustice and lead to hasty administration of the law. We can well appreciate the praiseworthy earnestness of our brother of the District Court in his desire to administer faithfully and promptly the law of which he is a minister; and without in any manner reflecting upon his

judgment and discretion, we are constrained to differ with him, and think he erred in not granting either a continuance or postponement of the trial. For the purposes of the trial of the motion, the affidavit was to be considered as true and the facts therein set forth in connection with the circumstances detailed, in our opinion, entitled the accused to the continuance sought. We do not see that the State could thereby have been injured, while the accused might suffer great injury by being forced to an immediate trial in the absence of witnesses in his behalf, to secure whose attendance sufficient time was not afforded. 30 An. 295; 26 An. 422.

The reasons given by the District Judge for overruling the motion in arrest of judgment, are not satisfactory. Under the authority of the text writers, and many English and American decisions, there is no doubt, that an indictment may contain distinct counts charging larceny in one and receiving stolen goods in another, and a conviction thereunder of either offence would be good, but we do not think that, under a single count charging only larceny, a conviction of receiving stolen goods can be maintained. The allegations as to larceny do not cover those necessary to constitute receiving stolen goods, and although the offences are to some extent kindred or of the same class, yet, they are as to punishment and to the essential ingredients constituting the crime, distinct. Bishop on Crim. Pro., Waterman's Digest and authorities cited by these authors.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that this case be remanded to the District Court of the parish of Vermilion, to be proceeded with, in a new trial, according to law, at the costs of the appellee.

No. 1121.

JOHN E. KING VS. ELBERT GANTT ET AL.

Defendant, having in his original answer admitted the adjudication to him at a tax sale, of Plaintiff's property, cannot be permitted to file an amended answer, setting forth error, possession in himself and other facts, which alter the substance of the original answer.

APPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

Henry L. Garland for Plaintiff and Appellee.

Lewis & Bro. and *F. F. Perrodin* for Defendant and Appellant:

An action, in which plaintiff claims to be the owner of real estate, and asks for the annulment of its sale for taxes on the ground that he had offered to redeem by paying the purchase price within the legal delay, and that the defendant be enjoined from perfecting that title, or doing any act to deprive him of the property, is a petitory action in its nature. C. P. 5; 1 R. 242; 9 L. 147.

King vs. Gantt et al.

Whether it be technically a petitory action or not, it involves title to real estate, and could not be maintained by plaintiff except as owner, which he was bound to allege and show. The law gives the right of redemption only to owners or mortgagees. Plaintiff was bound to allege every fact material to his case. 13 L. 52; Sec. 57, Act 96, 1877; R. S. 3299.

Tax sales are *prima facie* valid sales. Const. 1868, Art. 118; Const. 1879, Art. 210.

Defendant should plead all the titles under which he claims, and which the judgment, as *res judicata*, will estop him from subsequently setting up. 14 An. 582, Shaffer vs. Scuddy, 11 An. 111.

A party can urge as an exception whatever he can enforce as an action. C. P. 20; C. C. 2047; 12 R. 95 and 472.

Amendments should be allowed when they cause no injury and prevent a multiplicity of suits. 5 An. 674; 10 An. 599; 9 R. 78; 1 An. 254.

Amendments should be allowed where justice will be promoted. 3 R. 123; 14 An. 355; H. D. 1182, No 9; 27 An. 316.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff seeks the annulment of an adjudication made to defendant, of *his* property, at a tax sale. He alleges that, within the two years following the adjudication and allowed by law for the cancellation of such adjudication, he has tendered to the defendant the amount paid by him as adjudicatee, with interest and damages, but that the latter has refused to receive the same. He coupled his prayer or annulment with an injunction, to prevent the defendant from registering his adjudication and from procuring a title, or *deed*, from the creditor, to the adjudicated property.

The defendant pleads the general issue, but admits the adjudication, with the averment, however, that the property in question was placed on the assessment list in error, as it did not belong to plaintiff, but to him, as per a sheriff's sale to him. He further avers and prays that, in case the plea is not maintained, whatever rights he may have for the recovery of the property be reserved to him. Some five months afterwards, the defendant offered to amend this answer, by setting forth allegations of error, possession, surprise and readiness to allow plaintiff to redeem his own property, but unwillingness to surrender his own to him.

The lower court refused to receive the amending answer and, on the trial, consistently, to permit the introduction of evidence in support of it and in disproof of plaintiff's testimony. To such refusal bills were reserved.

On the merits, the court gave judgment, annuling the tax sale and making in favor of the defendant the reserve of rights asked by him. From this judgment the defendant has appealed.

The theory upon which this suit was brought seems to be, that the plaintiff was, and has never ceased to be, the real and true owner of the property offered at the tax sale and adjudicated to the defendant; that, in legal contemplation, the defendant, having illegally refused to

accept the money tendered, must be dealt with, upon payment of it to him, as though he had seasonably received it, and that things be declared to be in the condition in which they should have been, and in which they constructively and relatively are.

The question is not, therefore, whether the plaintiff is to be declared the owner of the property, but whether, *being* such owner, he had a right to compel the defendant to receive the money; in other words, whether he was a debtor and could force his creditor to receive payment as a condition precedent for the annulment of the adjudication.

The defendant's position is, that he was justified in not accepting the tender, for the double reason that the property never belonged to the plaintiff, who, therefore, was stripped of no right to it by the adjudication, *and* that the property was previously, and still is, exclusively his own; in other words, he claims ownership otherwise than from the adjudication.

The plaintiff does not ask to be recognized by the Court as the owner of the property. The prayer of his petition does not characterize his action as a petitory one, as one in which he revindicates title to real estate, contradictorily with another, setting up any pretension of ownership or other to it. He assumes that he is the owner, and claims that, by reason of the position in which the defendant has placed himself, by becoming the adjudicatee for taxes of property assessed in his (plaintiff's) name, and adjudicated as belonging to him, *he* has no title to prove, *as against* the defendant, who has admitted title in him, as holding under and through him. The plaintiff only asks *that*, which the acceptance of the money would have brought about, i. e., the nullity of the adjudication of the property to the defendant.

If the suit partake of the nature of a real one, which it apparently does, it can only be viewed as a *quasi* possessory action.

Constructively it is such—for the plaintiff seeks to be maintained in the possession and enjoyment of the property, and to that end, for the purpose of preventing apprehended and otherwise unavoidable disturbance, he has obtained the conservatory process of injunction. In such a case, it is clear that, in the very terms of the provisions of law regulating such actions, the defendant cannot set up a defense which could be considered as a petitory action, until after judgment in the possessory action, and satisfaction of the judgment, if adverse to him. C. P. 55.

If the action were petitory, the defendant could reconventionally set up title in himself and provoke a judgment recognizing it in him; but as it is not such, and is one bearing great affinity to the possessory action, the defendant cannot raise the issue which he has attempted to form.

Apart from these considerations, as the defendant has admitted the adjudication at the tax sale, and did not, in the original answer, plead *error*, but plainly and solely *title* in himself, without any qualification, he is estopped from contesting, or disputing ownership in plaintiff, from whom he holds as adjudicatee, and who is his author, and he cannot, therefore, be permitted to alter the substance of that answer, by injecting into it important means of resistance not seasonably and regularly set forth. It is manifest that the original special defense was diffidently ventured by the defendant, who cautiously and wisely prayed, in case the plea were not maintained, that his rights under the same be reserved for assertion in a different proceeding.

The lower court properly declined to permit the amendment and to receive evidence under it or the original answer.

On the merits, the testimony shows the tender, and that defendant's sole objection to it was as to its sufficiency in amount, which we deem is established, and is not now contested.

The plaintiff has prayed for no amendment.

It is, therefore, ordered that the judgment appealed from be affirmed with costs.

No. 118½.

The State of Louisiana vs. Henry J. Brown.

The certificate of the Clerk of Court from which a case is transferred, in a change of venue, attached to the copy of the original proceedings, such as the indictment, arraignment and plea, etc., not being stamped with the seal of the Court, is clearly inadmissible in evidence on the trial of the accused in the Court to which the case has been transferred.

The introduction on the trial of legal evidence of such proceedings had before the change of venue, being indispensable, the trial, verdict and judgment are illegal and must be set aside, and a new trial granted to the accused.

APPEAL from the Twelfth Judicial District Court, parish of Grant. *Barbin*, J.

Edwin G. Hunter, District Attorney, for the State, Appellee.

M. Ryan and *W. F. Blackman* for the Defendant and Appellant.

The opinion of the Court was delivered by

Todd, J. The defendant was indicted for murder in February, 1880, in the parish of Rapides.

On the 5th of May, 1881, he was tried on this indictment before the District Court of the parish of Grant. He was convicted of manslaughter and sentenced to ten years imprisonment in the penitentiary, and from this sentence has appealed.

He assigns as errors in the proceedings, upon which he relies for a

reversal of the sentence, certain alleged irregularities and improper rulings of the judge who presided at the trial, set forth in numerous bills of exception found in the record, but only one of which we find it necessary to consider for the determination of this case.

As stated, the defendant was indicted in the parish of Rapides but tried in the parish of Grant. All that the record shows of the proceedings in the latter parish, are those immediately relating to the trial, conviction and sentence, and the appeal therefrom. To authorize a conviction and sentence, the record must show not only the proceedings mentioned, but also an indictment, the return of the same into court by the grand jury, the arraignment of the prisoner and his plea, and, in short, the observance of all the prescribed formalities that precede trial and sentence. Without these, of course, a trial and conviction would be grossly irregular, null and void.

The case purports to have been transferred to the parish of Grant from the parish of Rapides, where the accused was indicted and where the offence was charged to have been committed, by a change of venue, granted on the application of the accused.

The law, in such case, requires that the clerk of the court where the prosecution was instituted, shall deliver to the clerk of the parish to which the case is transferred, the indictment and other original documents pertaining to the case, and a copy of all orders and proceedings rendered and taken in the court of the first instance. The duty seems to have been performed, so far as relates to the sending or transferring of the original documents to the parish of Grant, all of which appear in the transcript.

It, however, became necessary on the trial of the cause, that the proceedings taken in the parish of Rapides, relating to the prosecution, should be shown, such, for instance, as the return of the indictment into court, the arraignment and plea, and the order itself, by authority of which the venue had been granted and the trial was being had in the parish of Grant.

A copy of the minutes of the Court of Rapides parish, or what purported to be such copy, embracing the essential formalities mentioned, was offered during the progress of the trial, and objections were made by the defendant's counsel to its admission, the nature of which objections, and the ruling of the judge thereon, will be found fully set forth in the following bill of exceptions, which we transcribe in full:

"Be it known and remembered, that on the trial of this cause the District Attorney, representing the State, offered in evidence what purported to be a certified copy of the minutes of the court from Rapides parish and all the papers and documents filed in the case in the parish of Rapides, to which defendant objected, on the ground that there was

no authentic copy of said proceedings and no legal certificate of the clerk of the court of Rapides parish, as the certificate was not stamped with the seal of the District Court of Rapides parish, so as to make the same official, which objection was overruled by the judge for the following reasons, to wit:

"Because the accused cannot be heard to dispute or deny the change of venue, as he is the one that asked and obtained it; he stands here as an appellant, and because all the papers objected to were, as the law directs, the originals, except the copy of the minutes, which the accused cannot be heard to deny. To which ruling accused objected," etc.

We have no hesitation whatever in saying that the judge *a quo* erred in admitting this alleged copy of the minutes. In the most trifling matters relating to civil proceedings, in all processes from a court of record, such as citations, subpœnas, etc., a seal is essential to give them validity and authenticity and to authorize an obedience to such processes on the part of those against whom they are directed, and equally essential is it in relation to all acts and proceedings of any one of such courts certified to and requiring recognition by another.

It is elementary and a provision of positive law—a provision based upon immemorial usage—that a public seal, a seal of State and a seal of court, is essential, the one to authenticate the acts of a government, the other the acts of a court. Revised Statutes, Sec. 3471, 3474. In the language of Judge Bullard, the organ of the court, in case of Campbell, Richie & Co. vs. Karr, 7 La. 70: "The court has a seal, and the signature is incomplete without it. '*It is that which authenticates it, and makes it evidence in other courts.*'" See, also, C. P. 774; 10 La. 483; 12 La. 70.

If, in a civil proceeding, the authentication by the seal of the court is so absolutely demanded, how can we conclude that it is less essential or not essential in a criminal proceeding, where the life or liberty of a human being is at stake? Yet, such was the conclusion of the judge *a quo* for reasons assigned that are utterly without force or foundation. The change of venue had been ordered by another judge, and the proceedings, preliminary and pre-requisite, to a legal trial of the accused, purported to have taken place before that judge; the judge presiding at the trial of the accused could not know this fact or recognize such proceedings, or even be assured of the jurisdiction of his court over the subject-matter of the prosecution, unless the evidence of the same was presented to him duly and solemnly authenticated by the seal of that court, where such proceedings were had, and from which his authority in the premises emanated.

Eliminating this evidence, thus admitted without legal authentication, from the record, the proceedings, as they come to us, show a trial and conviction before a court without jurisdiction and without a finding

of a grand jury, without arraignment and without plea. We are, therefore, constrained to set aside the verdict and remand the case; and while forced to this conclusion, we cannot too loudly condemn the official carelessness that has produced, it may be, this delay of justice.

It is, therefore, ordered, adjudged and decreed that the judgment and sentence appealed from be annulled, avoided and reversed, and that the case be remanded to be proceeded with according to law and the views herein expressed.

No. 1120.

THE STATE OF LOUISIANA VS. ZEOLIN TOUCHET.

The accused, under the charge of larceny, having waived the trial by jury, and, after being tried by the Court and found guilty, having obtained a new trial, has the right *then* to change his former election and claim to be tried by the jury.

APPEAL from the Twenty-fifth Judicial District Court, parish of Vermilion. *Clegg*, J.

J. A. Chargois, District Attorney, for the State, Appellee.

F. R. King for Defendant and Appellant:

First—The right of trial by jury is one accorded by Art. 7 of the Constitution of 1879, and cannot be denied or abridged in any manner, except as therein provided. That said article does not contemplate the trial of an accused person in any other manner than by a jury.

Second—That act number 35 of 1880 is unconstitutional in providing that an accused may waive trial by jury and be tried by the Court.

Third—That the act of 1880, providing for the trial of offenses where the penalty is not necessarily imprisonment at hard labor, does not contemplate that an accused person may be tried without a jury, except at terms other than regular jury terms.

Fourth—The right of trial by jury accorded to an accused person, by constitutional law is a personal right, which, when once waived by the accused, may be revoked by him, upon his application for a trial by jury.

Fifth—That where it is shown that a jury is in attendance at court, on the day fixed for trial, and the accused demands trial by jury, he should be entitled to the same, although his application for jury trial may have been filed on a day when there was no jury in attendance.

Sixth—That upon the granting of a new trial in criminal matters, the case must be tried *de novo*, and the accused will be allowed to elect whether he be tried by the judge or the jury, notwithstanding he may have made an election previous to the first trial.

The opinion of the Court was delivered by

FENNER, J. Defendant, prosecuted for larceny, on his arraignment, elected to waive trial by jury, was tried by the district judge, and found guilty. On his motion, the judge granted him a new trial, and his case went over to the regular jury term, which opened on June 13th, 1881. On that day, the venire was returned in open court, and the petit jury

was discharged until the 16th. On the 14th, the defendant filed his motion, stating that, on the first trial of his cause, he had elected to be tried without a jury, but that, on the new trial which had been granted him, he elected and prayed to be tried by jury.

On objection by the district attorney, the court fixed the motion for hearing on the 15th, and set the case itself for trial on the 16th, on which day the jury was to be, and presumably was, in attendance.

On hearing of the motion, the judge denied the prayer, on the ground that having once elected to be tried by the judge, and having been so tried, it was not in the power of accused, upon the granting of a new trial, to revoke his election and demand a jury trial.

We think the judge erred. The right of trial by jury, in criminal prosecutions, is a constitutional right always jealously guarded in Anglo-Saxon jurisprudence. This right arises and exists as to every trial—as well as to that which follows upon the granting of a new trial, as to the ordinary original trial. Being about to be tried in a criminal prosecution, the Constitution invests him with the right of jury trial, of which he cannot be deprived except on his voluntary election. His waiver of jury as to the first trial may be presumed to continue as to the new trial, unless timely application be made to revoke the same; but he cannot be deprived of this right of revocation on timely application. The only limitation on his right would be that his application should be timely—that is, made in such season as not substantially to delay or impede the course of justice. In the present case, the trial might have proceeded before a jury on the day when it was tried before the judge, and the application, made prior thereto, was entirely seasonable, and should have been granted.

It is, therefore, ordered that the verdict, judgment and sentence herein be annulled and set aside, and that the case be remanded for a new trial according to law.

No. 1110.

T. C. Anderson vs. His Creditors.

On the trial of Oppositions to the application of a debtor for a respite, the creditors cannot propound interrogatories to him, such as, whether he had disposed of his property during the pendency of the respite proceedings, when the Oppositions contained no such charges, but only averred that he had not placed all his property on his schedule.

It seems that it is no good ground of opposition to the application for a respite, that the debtor placed on his schedule parties who were not his creditors, because, by so doing, he cannot prejudice the real creditors, and any of the latter, though not on the schedule, can, by making oath, vote at the meeting

In the absence of charges and proof of dereliction of duty, the notary appointed by the Court to hold the meeting of creditors, had the power, in the exercise of his sound discretion, to adjourn the meeting.

The majority in number and in amount, required for a forced respite, is that of creditors, whether placed on the bilan or not, who have appeared at the meeting, taken the oath prescribed by law, proved their claims and voted for the respite.

The respite and insolvency laws are perfectly distinct. The former rest upon the apparent solvency of the debtor, and are not suspended or affected by the general bankrupt law of the United States.

APPEAL from the Thirteenth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

John E. King & Veazie for Plaintiff and Appellee.

F. F. Perrodin and *H. L. Garland* for Opponents and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This case was remanded last term, for the trial of oppositions made to the homologation of the deliberations of the creditors of the plaintiff, on his application for a respite. 32 An. 892.

The oppositions were tried and dismissed. The deliberations were homologated and the respite asked was granted. From the judgment thus rendered, the opponents have appealed. Their grounds of complaint are substantially:

1st. That the plaintiff has not filed a complete and descriptive schedule of his assets and liabilities.

2d. That many who are represented by him as his creditors are not such, or, if such, are so for much smaller amounts; that certain named persons were not his creditors at all.

3d. That, even then, said parties had no right to vote at the time they did, which was not that fixed by the court for the holding of the meeting of the creditors, but that appointed by the notary arbitrarily and illegally.

4th. That the creditors who voted on the day assigned by the court refused the respite; that the creditors placed on the bilan and who did not appear at the meeting, should have been counted as having voted against the respite.

5th. That, in any event, the proceedings and judgment are unwarranted by law, because carried on under laws which, forming part of the State insolvent system, had been abrogated by the uniform bankruptcy laws adopted by Congress, and were not in force at the time and while the proceedings were inaugurated and consummated.

On the trial, the opponents propounded interrogatories to the plaintiff, for the double purpose of eliciting evidence to substantiate the allegation that he had not stated all his property, and to show that he was disposing of his property during the pendency of the respite proceedings. On objection to the latter object, the court ruled, that the

interrogatories should not be put, for the reason, that the oppositions incorporated no averment to justify the inquiry. To the ruling a bill was reserved, which appellants insist that we shall review. In so doing, we have only to say, that the ruling was perfectly correct, as in full accord with the elementary rule of evidence, which excludes evidence offered to prove matters not alleged. Particularly is such the rule, in cases of this description, where the contentions of parties are to be conducted and controlled according to the strict requirements of the law of pleading.

Having thus cleared the case for an investigation of it on its merits, we will now proceed to do so.

1st. The opponents have preferred no charge of fraudulent concealment on the part of the applicant for a respite.

The law certainly intends and requires that parties seeking that relief should be actuated by the strictest good faith, and should deal with the utmost fairness with the creditors whose indulgence they seek, by furnishing to them all proper information within their control, concerning their rights and obligations, so as to enable them to determine whether it is or not their interest to grant or refuse the extension sought. The law may decline its protection where the embarrassed debtor knowingly withholds, or intentionally refuses that information, when in his power; but it never contemplated doing so, when mistakes or errors have been involuntarily committed, and when the debtor, of his own motion, or on interrogatories, satisfies inquiries on the subject.

The record shows how the imperfections charged originated and how certain creditors were not included on the bilan. We are satisfied that the matter was fully elucidated below, and that the irregularities denounced by the opponents have been remedied and can no longer form any serious ground of complaint.

2d. It is immaterial whom the plaintiff placed on his schedule as his creditors, as, by doing so, he can prejudice no real creditor, whether put thereon or omitted therefrom. Parties carried by him on the bilan are recognized by him as his creditors, but are not made such by this mere act so as to conclude other creditors, or to give them any voice in the proceeding, unless they previously prove their claim by their personal oath. The insertion of their name creates a sort of *prima facie* presumption of their rights, which may fortify their sworn attestation and other proof which they may adduce in their own favor. It is not until after a litigation has arisen, putting the matter at issue, and has been determined, that it can be ascertained who is and who is not a creditor. It may well be, however, that parties pretending to be creditors may, by their oath, pronounce themselves such, in order to entitle them to a vote at the meeting, when they are, *in truth*, no such creditors. In such

cases, in a proper proceeding,—in the shape of an opposition to the homologation of the creditors,—the court would determine upon the right of the parties *to vote*, but would not assume, however, in all cases, to pass finally on the correctness of their claims for classification, which can be definitively adjudicated upon only when issues properly formed are presented for determination.

We have looked into the record on this subject, and find that *eight* persons, claiming to represent $13,160, have voted *against*, while *ten* others, sufficiently proved to be creditors, representing upwards of $30,000, have, on the three different days, voted *in favor* of the respite.

In making the computation, we leave out of view the question, whether the Citizens' Bank, which had at first voted *against*, and which subsequently intervened, praying to be permitted to vote *for* the respite, can be allowed to do so. It is clear that, if the bank could not change its vote, it could withdraw it before homologation. Even if it could not, the vote against the respite would be that of *nine* creditors representing $17,106 *against*, and *ten* creditors, representing more than $30,670, *for* the respite. Conceding that the five children of the applicant whose claims, for $6500, are assailed, are not creditors, the result would remain unchanged, as they are not included among the ten assenting creditors.

3d. We think that, in the absence of any charge and proof of gross dereliction of duty, detrimental to the interest of the creditors, the notary appointed by the court to hold the meeting of the creditors, had the right, in the exercise of a sound discretion, expressly vested in him by law, R. C. C. 3089, 3090, to adjourn the meeting, as was done in this case.

On the day assigned by the court, which was the 28th of June, 1879, a Saturday, he adjourned after receiving the votes of thirteen appearers, at five o'clock P. M., to Monday, the 30th, concluding his *procès verbal*, by saying, that he so adjourned upon advice, that other creditors were unable to attend on that day, who would do so on Monday. On that day, he received the votes of three creditors, and stating that, it being sunset, and the receiving of the declarations and votes not being completed, he adjourned the meeting to the day following, when he received the votes of eight persons, claiming to be creditors, and closed his *procès verbal* with a recapitulation, showing that nine creditors, representing $19,941, had voted *against*, while fifteen others, representing $37,676, had voted *for* the respite.

4th. Considering that the notary had a right to adjourn and to hold the meeting as he did, it is unnecessary to pass upon the question raised as to the creditors who voted, on the 28th of June, *against* the respite.

The proposition that the creditors placed on the bilan, who did not prove their claims and vote at the meeting, should be counted as having voted against the respite, is untenable. The authorities cited in support, in 3 N. S. 446, 504, 8 L. 467, 12 An. 520, 14 An. 30, cannot be successfully relied upon.

The two first decisions were made while the Code of 1808 was in force, which provided, that the creditors who had not taken the oath, at the meeting, would not be reckoned among the creditors possessing three-fourths of the debt. The court held, that it was not sufficient, that three-fourths of the creditors should assent, but that it should be made to appear by *their oath* that the creditors who have agreed are *bona fide* creditors, and thus, to prevent and defeat collusion, concluding that the proposition required to grant the respite should be three-fourths of the creditors in number and amount. In other words, the court held that the abstaining creditors should not be counted as consenting to the respite.

The provision of the Code of 1808 was modified by the Code of 1825, Art. 3053, which was to the effect that "the forced respite takes place when the creditors do not all agree, for, then, the opinion of *three-fourths* in number and amount prevails over that of the creditors forming the other fourth, and the judge shall approve such opinion, and it shall be binding on the other creditors who did not agree to it."

The case in 8 L. 497 does not appear to have any bearing on the question before us. It merely decides, that *all* the creditors, whether hypothecary or chirographery, on the bilan or not, have a right to vote and to be counted when voting, on an application for respite.

Some eight years after this decision was rendered (1843), the Legislature passed an act amending article 3053, so that the opinion of a *majority* of the creditors in number and amount should prevail in cases of respite. See Act 1843, p. 51.

In the case in 12 An. 520, the question presented was, whether in counting the votes to ascertain the majority in number and amount, those given at the meeting of the creditors were alone to be considered, or whether the majority in number and amount was to be ascertained by reference to those admitted by the debtor upon the bilan: the court, referring to and relying upon the cases in 3 N. S. 446, 504, and 8 L. 467, held, with hesitation, that reference had to be made to the creditors on the bilan also, who, not having voted *for*, should be considered as having voted *against*, the respite. Hence, the defense of *respite granted* set up by Castel, in that case, was overruled and the plaintiff, Rouanet, recovered judgment.

The question presented in that case had never been solved before, and has not since been again submitted. It was one apparently involv-

ing some doubt; but whatever the views entertained at the time were, we cannot now recognize the correctness of the diffident ruling, without obliterating entirely from the Code the provision which declares, that the creditors who do not make the oath prescribed "shall not have the right of voting, and their credits shall not be counted among those by which it is to be determined whether the respite is granted or not. R. C. C. Art. 3087, § 5; Art. 3054 of the Code of 1825.

In 14 An. 30, the Court held that since the statute of 1843, a bare majority of the creditors have the power to grant the respite and thus postpone the payment of the debts of the minority. It does not appear in that case, that the abstaining creditors placed on the bilan were counted at all.

After a survey of the law and jurisprudence, and upon mature deliberation, we conclude that the required majority in number and amount is that of creditors, whether placed on the bilan or not, who have appeared at the meeting, taken the oath prescribed by law, proved their claim and voted for the respite. This majority is indispensably necessary to grant the relief, so as to bind the creditors who have not agreed to it, in other words, who have refused it. Holding differently, would be to recognize in the applicant the power of disqualifying from the right of voting, creditors voluntarily omitted by him from the schedule. The proposition that the abstaining creditors are to be counted as having voted *against* the respite, therefore, lacks foundation, and being implausible, cannot for a moment be countenanced.

5th. The opponents next contend that the laws relative to respite, being part of the insolvent laws of the State, were superseded, abolished and repealed by the passage by Congress of a general bankruptcy law, and have not since been revived or re-enacted.

There is no affinity between respite and surrender laws. They differ essentially. The former rest on the apparent solvency, the latter on the conceded insolvency, of the debtor. In the first case, the property remains in the possession and absolute ownership of the applicant, in the latter, it passes with qualifications to the creditors. 12 An. 182; 3 R. 407; 3 R. 410.

In the case of Rush vs. Creditors, 3 R. 407, this Court held that the respite laws had not been repealed by the Federal bankrupt act. See, also, Bouvier Law Dict. vol. 2, 363; Pothier Obl. vol. 1, No. 88; R. C. C. 3051.

The right of the States to pass a bankrupt law is not extinguished, but merely suspended by the enactment of a general bankrupt law. Such a law merely suspends, without repealing them, State insolvent laws, which revive and continue in force on the repeal of the bankrupt law, and need not, therefore, be re-enacted. 12 B. R. 182; S. C. 43;

Md. 153. The repeal of such law removes the disability created by the Act of Congress. Sturges vs. Crowninshield, 4 Wheat. 122; Bump's Notes on Constitutional Decisions, p. 72–79; Orr & Lindsay vs. Lisso & Scheen, 33 An.

It cannot be claimed that those laws impair the obligations of contracts. They were in force when the relations of debtor and creditors arose between the plaintiff and the opponents, and they are presumed to have contracted in reference to those laws, which, therefore, form part of their contracts or engagements, which having thus been entered into or incurred, must be controlled accordingly, as effectually as if it had been expressly provided that, in case a majority of the debtor's creditors in number and amount were, on his judicial application, to grant him an extension of time, the delay would apply to the claims of all creditors composing the minority.

The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made, and which are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that the terms of the contract indicate according to their settled legal meaning. 12 Wheat. 213; 4 Wheat. 122; 1 How. 311; 2 How. 508; 3 Mart. 531; 9 Cal. 81; 31 Penn. 175; 6 Otto, 448, 598; 4 Wall. 535; Bump, 120–127.

We find no error in the judgment appealed from.

It is, therefore, affirmed with costs.

No. 1111.

THE STATE OF LOUISIANA VS. HERMAN R. POLAND.

Under Sec. 1056, Revised Statutes, the verdict of the jury is good, though omitting the words: "not guilty of embezzlement",—and containing only the words: "guilty of larceny".

Under the same section, the information is sufficient in charging the accused with embezzlement as "agent" merely.

APPEAL from the Criminal District Court for the parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General, for the State, Appellee.

R. L. Belden and *F. G. Chamberlain* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Defendant was prosecuted, on information, for the crime of embezzlement. The jury returned a verdict "guilty of petty larceny." Error in the verdict is assigned on three grounds, viz:

1st. The section 1056 R. S. provides that in prosecutions for embezzlement, if the evidence establishes, not embezzlement, but larceny, the accused "shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is *not guilty of embezzlement, but is guilty of larceny.*" It is contended that the verdict is defective because not finding the accused "not guilty of embezzlement."

The point has no force. The verdict has precisely the same meaning, force and effect as if it read "not guilty of embezzlement, but guilty of petty larceny." It operates a complete bar to further prosecution for the same act.

2nd. It is contended that as the information charged the defendant with embezzlement as "agent" merely, the verdict for larceny is not authorized by Sec. 1056 R. S., whose terms only cover the case of "a person indicted for embezzlement as a clerk or servant, or person employed for the purpose or in the capacity of a clerk, or servant or depositary."

The term "agent" is certainly broad enough to cover at least some of the capacities mentioned in the section, which enlarges the designation of specific capacities contained in the statute defining the crime of embezzlement and mentions capacities only covered, in that statute, under the general term "agent." In the absence of any bill of exception, motion for new trial, motion in arrest, or objection of any kind, in the court below, we must assume that the evidence justified the verdict.

3d. It is objected that the statute only authorized a verdict or "larceny," and not for "petty larceny." In view of the Act 124 of 1874, this objection is frivolous.

Judgment affirmed.

No. 1134.

DAVID HAYES, ADMINISTRATOR, VS. T. VIATOR, SHERIFF, ET AL.

Lands held in indivision by several parties must be assessed as a whole in the names of all the joint owners and for the non-payment of taxes, must be seized and advertised for sale also as a whole, in proceedings directed against all the joint owners.

The injunction to prevent the tax sale in the case, is made perpetual on account of numerous other irregularities in the proceedings.

APPEAL from the Twenty-first Judicial District Court, parish of Iberia. *Fontelieu, J.*

Jos. E. Breaux and *P. L. Renoudet* for Plaintiff and Appellant:

First—The description of immovable property assessed for taxes should be correct. Person vs. O'Neal, 32 A. 234; Burroughs, p. 204; Blakewell, pp. 141, 142, 147; Thibodeaux vs. Keller, 29 A. 509; Woolfolk vs. Fonbene, 15 A. 5; Sutton vs. Calhoun, 14 A. 210.

Second—The names of the owners of the land assessed should be correctly carried upon the assessment roll. Guidry vs. Broussard, 32 A. 924; Ib. 912; 29 A. 509.

Third—Property belonging to joint owners should be assessed against the joint owners. The partition of property should not be attempted by the assessor, a part of whose functions consists in listing lands and in assessing them correctly, but not in partitioning them to the detriment of the interest of mortgage creditors. Blakewell, pp. 141-147.

Fourth—When property is divided some account shall be taken of the relative value of the different lots.

Fifth—When assessment of land is made against non-residents, the fact of non-residence should be mentioned on the rolls. Act of 1871, section 18, p. 111; Act of 1877, section 16, p. 139; Cooley, p. 277.

Sixth—Registry laws apply to tax liens. 31 A. 517; Constitution 1868, Art. 123; 25 A. 232.

Seventh—The delinquent list should be a copy of the assessment roll.

Eighth—The prescription of two, three and five years, is a bar to the recovery of taxes for 1877 and previous years when the land has not been forfeited to the State.

Ninth—Act No. 9, of 1878, sections 20 and 22, fix amount which would be exigible for interest if the taxes were due.

W. B. Merchant, District Attorney, *contra.*

The opinion of the Court was delivered by

Todd, J. On the 23d of January, 1869, John Hayes, whose succession is plaintiff in this case, sold to David Hayes, Alexander M. Hayes and William Hayes, as described in the act of sale, "a certain plantation situated in the parish of Iberia, and containing two thousand and sixty acres, more or less, situated on both sides of the Bayou Petite Anse, in Township 13, South Range 5 East, and in Township 13, South Range 6 East," with the further description that it was the same plantation which had on a previous date been adjudicated to Pelagie Hayes at a succession sale. The price was $15,000 on a credit. On the 25th of March, 1875, a judgment was rendered against the vendees for the sum stated, with a recognition of the mortgage and vendor's privilege on the property, which had been retained as security for the payment of the price. No partition of the land was made between the joint purchasers.

In January, 1881, an execution issued on this judgment, and the plantation was seized.

On the 5th of March following, the sheriff and tax collector advertised the property for sale for payment of delinquent taxes.

The plaintiff, alleging that the property was then under seizure to pay the judgment mentioned, enjoined the tax collector from selling the land on the following grounds, set forth in the petition, which we copy, to wit:

1. The lands, an assessment of which has been attempted, are not correctly located; the boundaries are varying and uncertain.

2. They are not assessed in the names of the owners.

3. A mortgage creditor is not bound by the illegal division of lands. If the property be divided, it must be divided in a legal manner. If

illegally divided for taxation, the forfeiture to the State is equally as illegal, and it (the State) cannot have the land sold as having become its property by forfeiture.

4. Assessment was made against William Hayes as a resident. He had always been a non-resident.

5. The delinquent lists are informal and absolutely illegal.

6. They have not been recorded in time to secure a privilege in favor of the State, priming plaintiff's mortgage, nor have the assessment rolls of 1877, and since, been recorded in time to secure a privilege against the pre-existing rights of the plaintiff.

7. The amount claimed is not indicated in the advertisement for all the years for which taxes are alleged to be due.

8. No forfeiture having been made to the State, the taxes are prescribed; in any event, the taxes for 1877 are prescribed.

9. Interests and costs are not due at all, but, if due, those claimed are excessive.

The answer was a general denial.

The plaintiff is appellant from a judgment rejecting his demand and dissolving the injunction.

It is unnecessary to consider all the alleged nullities set up in the plaintiff's petition; we will notice those only that have mainly influenced us in the conclusion we have reached.

We have given the description of the land as found in the deed, in order to show the discrepancy between the true description of it and that given in the tax proceedings relating to the same property, which latter description we transcribe literally from the record, as follows:

"Hays David 800 b' d' N. Hollingsworth. S. Hayes W. Avery. Hayes M. 800 acres, b' d' N. Hollingsworth S. Hayes W. Avery."

And under the heading of non-residents:

"Hayes Wm. 800 acres b' d. N. Hollingsworth S. Mass."

This enigmatical, condensed and unique description is the one under which, it is alleged, the land is to be sold; and it is the same, with some very slight and immaterial variations, in all the assessment proceedings since 1871.

When it is considered that the property assessed and to be sold under this vague description, consisted of a plantation or land, as described in the deed referred to; that there had never been a partition of it, and each of the taxpayers held no definite number of acres, but an undivided interest in the entire tract, the vitally defective character of this description becomes obvious to every one.

The officer had no power to divide the lands for the purpose of sale, yet he offers to sell 800 acres as belonging to each one of the alleged delinquents. Should he find a purchaser or purchasers, how would he

manage to put each of them in possession of 800 acres of land marked out and defined, in which no one else would have an interest but such purchaser? The assessment is the foundation of the proceedings relating to a tax sale. It is likened to a judgment which is the basis of a judicial sale. It would hardly be pretended that under a judgment against "A" the sheriff could seize and sell a certain number of acres of a tract of land which "A," the judgment debtor, owned in indivision with "B," and make delivery of the same to the purchaser. It has been decided that he could not seize or sell a definite part or the whole of the land under such conditions. 3 R. 257; 23 An. 681. And equally powerless would a tax collector be to sell under such an assessment as we have shown.

A proper assessment is essential to the validity of a tax sale. 14 An. 709; 15 An. 15; 30 An. 293.

It is not shown that Wm. Hayes or A. M. Hayes were even served with the notices prescribed by law, or made any return of property to the assessor for assessment.

Wm. Hayes lived in another parish, and is termed in the collector's proceedings a non-resident. The proceedings, however, were not so conducted against him, but there was a total disregard therein of the requisites of the law applicable to this class of taxpayers.

Wm. Hayes died long prior to the seizure and proposed sale by the tax collector, but notwithstanding his death, the proceedings were carried on and the sale advertised to take place as if he were living.

Notices appear to have been served alone on David Hayes, and he was treated as the agent of the others; but no authority to represent them is shown. The tax collector is not represented in this Court by counsel, and we are at a loss to know on what he relies to break the force of the attack made by plaintiff on these tax proceedings. It might be contended that David Hayes, having been notified and having consented to this illegal assessment, the sale should proceed as to the 800 acres assessed against him. There might be force in this proposition if he were the sole owner of these 800 acres, and no one interested in the proposed sale but himself; but as the entire land is undivided, the 800 acres offered for sale as his property are also undivided; and that number of acres or a greater or less number of the whole body could only be sold in indivision; and two-thirds of the sale would belong still to his joint proprietors, and no title could, therefore, pass to the purchaser to a single acre, as the distinct property of the delinquent taxpayer.

This makes it the more apparent that land held in indivision must be assessed according to the title, and only the undivided interests of the joint owners, and not any definite part or stipulated number of acres, can be legally assessed as the property of any one of them.

There are other irregularities that might be noticed, such for instance as the failure of the collector to swear to the correctness of the assessment rolls as required by law; the failure of the assessors to attest or approve the tax rolls, and to deposit or return them to the proper office within the time prescribed. These irregularities might be considered in detail; but we have sufficiently shown illegalities in the proceedings of so vital a character, as to clearly entitle the plaintiff to arrest the sale threatened to be made under them, to the prejudice of his mortgage rights and of his possession of the property under the writ issued to enforce his judgment.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the defendant, tax collector of the parish of Iberia, be and he is hereby perpetually enjoined from selling the property described in the mortgage and judgment set forth in the petition, or any part thereof, and the act of said officer in advertising and offering for sale said property be and the same are declared unauthorized, said defendant to pay the costs of both courts.

No. 1097.

SUCCESSION OF MRS. JANE HOPKINS. ON OPPOSITION TO THE EXECUTOR'S ACCOUNT.

A testamentary executor who has qualified as such, cannot be deprived of his commission on the amount of the inventory because the heirs and legatees agreed between themselves to make a distribution of the assets of the succession.

APPEAL from the Parish Court, parish of Iberia. *Allison, J.*

W. B. Merchant for Opponents and Appellees.

Jos. A. Breaux and *Don Caffrey* for Defendant and Appellant.

The opinion of the Court was delivered by

LEVY, J. Mrs. Jane Hopkins died in the year 1879, having made her nuncupative will by public act, which, shortly after her death, was duly probated and ordered to be executed. In her will she appointed Wm. Robertson her executor; he duly qualified as such. After several particular legacies, she bequeathed the remainder of her estate to her brother-in-law, Lucius D. Hopkins. The following clause is contained in the will: "The testator hereby declares, that she desires William Robertson to be appointed testamentary executor, and she, therefore, appoints him, with full authority as executor, to have the seizin of the property and to perform all the duties incumbent on an executor." The

executor filed his final account of administration, in which he charged the succession with the sum of $2184 55, commissions of 2½ per cent. on the total amount of the inventory, ($87,382 62½). To this item, Mrs. Mary Land and William Land, legatees, filed an opposition, on the ground that the executor had done and performed no acts of administration; had not taken possession of the effects or property of the succession, there having been a compromise and settlement, by notarial act, between the particular and universal legatees, which obviated the necessity of any administration by the executor, and whereby the estate was put into the possession of the opponent, Mrs. Land. This opposition was sustained by the Parish Court, and the claim of the executor for said item for commissions rejected; and said executor has appealed.

The judgment of the lower court, in this regard, is erroneous. The executor, duly constituted such by the express terms of the will, took the prescribed oath of office, and thereby assumed the functions of his office and became responsible for their faithful discharge and performance. If he had been derelict in duty; if through his misfeasance or malfeasance the estate had been squandered or diminished, either by himself or those to whom he entrusted it, or whom he permitted to enjoy or use it, there can be no question as to his liability to the parties who might be injured. It matters not that the legatees or heirs chose, by consent and agreement among themselves, to make a distribution of the assets of the succession; this cannot be allowed to deprive the executor of the fees and commissions fixed by law.

The oral declarations of the testatrix in regard to her alleged wish, that the executor should resign his trust, cannot prevail over the solemn terms of the will itself, any more than oral suggestions or declarations in regard to the legacies, particular and universal, could have authorized or justified the executor to refuse the recognition or payment of the legacies made in the will itself. There is not the slightest foundation for the opposition, either in law, reason or justice. C. C. 1683; 26 An. 195; 25 An. 323; 12 L. 73; 1 R. 98.

In this case, the executor, under the will, had full seizin of the estate, and is entitled to 2½ per cent. commissions on the value, as determined in the inventory.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be amended in so far as it sustains the opposition to the item of $2184 55, commissions claimed by William Robertson, executor, and that said item of $2184 55, commissions aforesaid, be allowed as a just legal charge against the succession of said Mrs. Jane Hopkins, and in all other respects the judgment appealed from is affirmed; the costs of their opposition and of this appeal to be paid by the opponents, Mrs. Mary Land and William Land, *in solido*.

No. 1117.

JULIE CORMIER, ADMINISTRATRIX, VS. THEODORE DEVALCOURT, ADMINISTRATOR.

A married woman, separated in property and administering her own affairs, is liable on her note without proof that it enured to her individual benefit.

The plea of interruption of prescription, after the latter has been acquired, can only be supported by written evidence.

A Curator *ad hoc* of a minor cannot waive citation.

APPEAL from the Twenty-fifth Judicial District Court, parish of Lafayette. *Clegg*, J.

M. E. Girard for Plaintiff and Appellant:

An attorney can accept service of process and interrupt prescription.

A curator *ad hoc* may also acknowledge service and interrupt prescription. 31 An. 540; 2 An. 916.

The acts of an attorney or agent unless disavowed in proper time, and as soon as brought to the notice of the principal will be thereby ratified and be binding for all purposes.

A party purchasing property at a sale made by virtue of a judgment ordering said sale, is estopped from questioning the validity of that judgment and all proceedings therein, and a party acquiescing in a judgment by paying a part of it, renounces the means and exceptions that might have been opposed to it. 23 An. 28, Gernon vs. Dubois; 23 An. 524, Wailes vs. Bank.

A party who has entered into a compromise with another to pay him a note after a certain time, is precluded from contesting the rights of the creditor. 22 An. 429, Conrad vs. Callery.

C. DeBaillon and *C. H. Mouton* for Defendant and Appellee:

First—Note sued upon is prescribed. R. C. C. 3540.

Second—Authority of an attorney can be denied—when denied, must be proved. 10 An. 669; 15 An. 569; 5 An. 551; 14 An. 866; 1 An. 398.

Third—Only the defendant himself, or his attorney, can accept service and waive citation under article 177 C. P. The *appointee* of the court cannot. 4 N. S. 680; 10 M. 472; 1 M. 516; 33 An. 212.

Fourth—Service on a minor can be made *only* on the curator *in person* or at his domicil. C. P. 195.

Fifth—A minor cannot be brought into court, by simply having a curator *ad hoc* appointed to represent him. 2 An. 562.

Sixth—The acceptance of a curatorship must be made to appear. 2 An. 446.

Seventh—Acceptance of service and waiver of citation by an unauthorized attorney—not even an appearance—does not interrupt prescription. 14 An. 3, 866; 1 An. 398; 2 An. 840; 5 An. 551; 10 M. 472; 4 N. S. 680; 1 M. 516.

Eighth—Petition of intervention must be served, and parties against whom it is directed must be cited to have any legal effect. C. P. 393; 15 A. 206; 20 A. 258; 3 A. 331; 16 L. 268; 25 An. 564.

Ninth—Note sued on was subscribed by a married woman for money borrowed. without complying with Acts of 1855, p. 254; the burden was on plaintiff to show that the money borrowed enured to the benefit of the wife. 15 An. 352; 16 An. 449; 20 An. 229; 24 An. 96-89; 21 An. 525; 29 An. 123; 5 N. S. 56, 5, 495; 15 An. 628-621; 12 An. 853; 5 An. 173; 14 An. 172, 700; 22 An. 457; 23 An. 196, and other authorities.

Tenth—It is not necessary when bill of exceptions is tendered to mention the same on note of evidence. Acts 1877, E. S. p. 176.

Eleventh—After prescription has accrued, an administrator cannot waive or renounce. 2 An. 546, 927; 21 An. 373, 748; 24 An. 83, 183; 26 An. 380; 1 An. 330; 8 An. 505; 23 An. 172, 193; 22 An. 445; 31 An. 721; 3 N. S. 707; 25 An. 491; 18 An. 219.

Twelfth—Nor could Philomene Thibodeaux, the natural Tutrix. 9 An. 122; 29 An. 798.

Thirteenth—No compromise was made or could have been made. 15 L. 145; 11 An. 184, 212; 14 An. 274, 617; 25 An. 476, 511.

The opinion of the Court was delivered by

LEVY, J. Julie Cormier, administratrix of the succession of Placide Guilbeau, deceased, instituted this suit on the 29th of June, 1874, against Theodore DeValcourt, administrator of the succession of Leontine Guilbeau, wherein she seeks to recover of the defendant, representing said last named succession, the sum of $1736 05 with 8 per cent. per annum interest from 11th of June, 1864, on a promissory note for said sum signed by said Leontine Guilbeau, assisted and authorized by her husband, dated June 11th, 1864, payable on demand to Placide Guilbeau, Sr., or order. Defendant in his answer denied that any consideration had been given for the note, and alleged that it was null and void, and pleaded the prescription of one, three, five and ten years. There was judgment in favor of defendant, dismissing plaintiff's suit and rejecting his demand at his costs, and plaintiff has appealed.

Leontine Guilbeau was separate in property from her husband, by a decree of court rendered in the year 1847, and administered her own property and affairs; the note sued on was given in renewal of one previously executed by her, and she had acknowledged it as her own debt. Being thus separate and administering her own affairs, there is no proof offered that the consideration of the note enured otherwise than to her individual benefit. The only question involved, then, is that of prescription. In 1869, and before the expiration of five years since the maturity of the note, a suit, No. 3038, was instituted by the plaintiff thereon, the service of petition having been acknowledged by Wm. Mouton, Esq., as attorney of the defendants, the heirs of Leontine Guilbeau. On appeal to the Supreme Court, the judgment in favor of plaintiff was reversed and there was judgment of nonsuit in favor of defendants. Within a short time after this decision of the Supreme Court the present action was brought. On the face of the note prescription had accrued, and this plea being made, it devolved upon the plaintiff to show interruption of prescription. Defendants rely upon the institution of suit No. 3038 and the service made therein, and on an alleged compromise or agreement in 1872 between plaintiff and the heirs of Leontine Guilbeau, as an acknowledgment and recognition of the debt evidenced by the note. Defendant denies that the attorney who acknowledged service of the peti-

tion in suit No. 3038 had been employed by the heirs or those representing them, and averred that such acknowledgment and waiver of citation was null and void and not binding on them, and deny the validity of the alleged compromise or agreement in 1872, made after prescription had accrued and by parties unauthorized to bind them. We are satisfied, after careful examination of the record, that the acknowledgment of service of the petition in suit No. 3038 by the attorney was done without the authorization of the heirs of Leontine Guilbeau, and that the proceedings in that suit do not, therefore, operate as an interruption of prescription. Even if the compromise or agreement was made with proper authority (which is not established by the evidence in the record), the acknowledgment or recognition, inferential at best, was made after prescription had accrued, and not being made in writing, could not operate as a renunciation. The service on a curator *ad hoc* of a minor must be made in person or at his domicil, and waiver of citation by such curator is not sufficient. 23 An. 215; 5 An. 551, 6 R. 142; 12 R. 540; 28 An. 258.

The judgment appealed from is affirmed with costs.

No. 1126.

DAVID H. LYONS VS. PARISH OF CALCASIEU.

Suit by sheriff against Calcasieu parish for his fees. His account being approved by the Clerk and presiding Judge of the Court, under sec. 1042 Rev. Sta., the burden of showing illegal charges is on the Parish.

The Court *a qua* properly refused leave to file amended Answer, after the cause was called for trial, under the circumstances of the case.

Plea of prescription overruled.

APPEAL from the Fourteenth Judicial District Court, parish of Calcasieu *Hudspeth*, J.

F. A. Gallaugher and *G. A. Fournet* for Plaintiff and Appellee:

First—An amended answer comes too late when offered after the case has been called for trial. 22 A. 350, 534; C. P. 420.

Second—An amended answer changing the substance of the issue cannot be allowed. 11 La. 73; 22 An. 350; 28 An. 109; 32 An. 920; C. P. 419-420.

Third—The matter of a continuance addresses itself to the sound discretion of the court. 18 An. 222; 19 An. 268.

Fourth—Police Jury warrants may be admitted to corroborate and substantiate the claim. 28 An. 192, 860.

Fifth—Police Juries cannot question the correctness of accounts approved by the clerk and presiding judge. R. S. 1042; 14 An. 246; 18 An. 195; 27 An. 168; Parker vs. Robertson 14 An. 246.

Sixth—The testimony of a witness taken at the first trial is admissible, if the witness be absent at the second trial. 26 An. 313; 29 An. 156; Shaw vs. Howell, 18 An. 195.

Seventh—The sheriff is entitled to ten cents a mile going to and returning from the service of each and every process. Act 101 of 1870; New Orleans vs. Patton, 27 An. 169.

Andrew J. Kearney for Defendant and Appellant:

In a suit by a sheriff on account for costs and fees, warrants in his favor on the parish treasurer for part of such costs and fees are not admissible in evidence, because the evidence does not correspond with the allegations.

One deputy sheriff cannot make nor prove a return of service of process served by another deputy, nor prove the fact of such service. This can be done only by the deputy who made the service.

The law allowing sheriffs to charge mileage only for miles actually and necessarily traveled if he serves process in the same case or on the same day in the same neighborhood, on several persons, he cannot legally charge full mileage for each service. The law on this point construed and decided.

The plea of the general issue, in a suit on account, throws on plaintiff the burden of proving each item of his account, and by legal evidence.

The opinion of the Court was delivered by

FENNER, J. Plaintiff sues the parish of Calcasieu for an amount due him as sheriff for fees in criminal cases, maintenance of prisoners and attendance on court.

He establishes that his accounts have all been approved by the clerk and presiding judge of the court as provided by R. S. § 1042, and that most, if not all, of them had been presented to the police jury of the parish and acknowledged by that body. He further satisfactorily establishes that the services charged for were actually rendered.

No serious suggestion is made that any of the charges are in excess of the rates allowed by law, except in the matter of mileage, as to which it is claimed that in serving process upon several persons, in the same case, at the same time, and in the same neighborhood, he has charged full mileage for each service. It is claimed that this is in violation of the law which only allows mileage for miles "actually and necessarily travelled" in making service. This position may, perhaps, be correct, though we are not called on to pass upon it here. The approvals of the accounts by the clerk and judge and their acknowledgments by the police jury, certainly threw upon defendant the burden of showing errors or illegalities therein; and there is no evidence showing that any particular item or items are amenable to the objection above stated.

We think, under the circumstances of this case, the judge *a quo* did not abuse his discretion in rejecting the amended answer offered to be filed by defendant after the cause was called for trial. The case has been pending for two years and had been at issue for about a year. It was a recused case and was set for trial at a special term before a judge from a neighboring district. Its continuance would have involved great inconvenience and delay. No sufficient reason was assigned for the laches in postponing the filing of the answer; and circumstances indicated that the object was delay. Besides, nothing suggests that defend-

ant was deprived of any means of defense which would have been afforded under the amended answer.

The plea of prescription filed in this Court has no force. The accounts sued on were accounts acknowledged and prescriptible only by ten years.

Justice has been done.

The judgment is affirmed at appellant's cost.

No. 1112.

THE STATE OF LOUISIANA VS. SAMUEL HARLIS.

In an Indictment for perjury, it is indispensable to aver before which Court or authority the offense charged was committed, and also, that the officer who administered the oath to the accused, was competent to do so.

APPEAL from the Twelfth Judicial District Court, parish of Avoyelles. *Barbin*, J.

E. D. Hunter, District Attorney, for the State, Appellee.

E. Joffrion, L. J. Ducoté and *Albert Voorhies*, for Defendant and Appellant:

The information is defective as follows:

First—It does not state before what court the perjury was committed.

Second—It does not aver the administration of the oath, nor state by whom it was administered.

Third—It does not aver that such court or person had competent authority to administer the oath.

Fourth—It does not state the substance of the offense charged, as required under common law precedents, with the modifications of the law of Louisiana.

Fifth—It has no averment to falsify the matter wherein the perjury is assigned.

Sixth—It does not indicate the proceeding in which the oath was administered.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused was prosecuted for perjury, tried, convicted and sentenced to five years imprisonment at hard labor in the State Penitentiary. From the rulings on the trial and the judgment thus rendered he has appealed.

By bill of exception and motion in arrest of judgment, he complains that the information is fatally defective in several particulars, which it is unnecessary to enumerate, but which will be considered.

The statute requires the setting forth of "the substance of the offense, by what court, or before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with a proper averment to falsify the matter wherein the perjury is assigned." R. S. 858.

Perjury is a common law offense. The statute denounces the crime without defining it. All the common law requirements should have been followed. 9 An. 211; 5 An. 234; 20 An. 147; 26 An. 71.

In State vs. Cook, 20 An. 147, the Court said: "The English forms of indictment have been in use for many years; they have stood the test of time; they can hardly be bettered in respect to clearness, fullness and succinctness, and it is very desirable that prosecuting officers would observe them more strictly."

In the case before the Court, the requirements of the statute touching essential averments should have been and were not observed. The information does not state before what court the crime charged was committed, or by whom the oath was administered. It was necessary to have made those averments, and also that the officer who received the oath had competent authority to administer it. 29 An. 71, 147; 4 An. 324; 32 An. 428; Archbold, Cr. Pr. vol. 3, 592, 12, 593, 1, 15, 594.

The bill of exception was well taken, and the motion in arrest of judgment should have prevailed.

It is, therefore, ordered that the verdict of the jury be set aside, that the judgment and sentence be reversed and avoided, and that the case be remanded for further proceedings according to law, the defendant to remain in custody, subject to the orders of the lower court, for further prosecution according to law. 32 An. 576; 30 An. 817; 1028.